Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1996

CITY OF DALLAS, TEXAS,
WILLARD ROLLINS, RICHARD HATLER,

Petitioners,

vs.

RICHARD KIRKS and JAN FORSYTH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES A LATERAL TRANSFER OF EMPLOYEES, FROM THE DAY SHIFT IN THE INTELLIGENCE DIVISION TO THE NIGHT SHIFT IN THE PATROL DIVISION WITH GENUINE RESPONSIBILITIES AND DUTIES IN THE NEW POSITION AND WITH NO REDUCTION IN SALARY, RANK, GRADE, BENEFITS, OR LOSS OF PROMOTIONAL OPPORTUNITIES, CONSTITUTE AN ADVERSE EMPLOYMENT ACTION UNDER THE FIRST AMENDMENT?

II. IS A PUBLIC OFFICIAL ENTITLED TO QUALIFIED IMMUNITY WHEN HE LATERALLY TRANSFERS EMPLOYEES, BECAUSE OF STATEMENTS MADE BY THE EMPLOYEES AND THE POTENTIAL DISRUPTION IN THE WORKPLACE, FROM THE DAY SHIFT IN THE INTELLIGENCE DIVISION TO THE NIGHT SHIFT IN THE PATROL DIVISION WITH GENUINE RESPONSIBILITIES AND DUTIES IN THE NEW POSITION AND WITH NO REDUCTION IN SALARY, RANK, GRADE, BENEFITS, OR LOSS OF PROMOTIONAL OPPORTUNITIES?

III. IS A SPEAKER'S MOTIVATION OR INTEREST IN "SPEAKING OUT" A DETERMINATIVE FACTOR IN DECIDING WHETHER THE SPEECH ADDRESSES A MATTER OF PUBLIC CONCERN?

IV. DOES THE *PICKERING* BALANCE REQUIRE A SHOWING OF ACTUAL DISRUPTION RATHER THAN A SHOWING OF A POTENTIAL DISRUPTION OF, OR

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LIKELY INTERFERENCE WITH, THE EFFICIENCY OF THE WORKPLACE BEFORE THE EMPLOYER MAY TAKE EMPLOYMENT ACTION?

V. CAN A MUNICIPALITY BE HELD LIABLE UNDER 42 U.S.C. § 1983 IF THE DISTRICT COURT HELD THAT NO INDIVIDUAL DEFENDANT WAS A POLICY-MAKER, AND RESPONDENTS FAILED TO ESTABLISH THAT THE CITY HAD A POLICY OR CUSTOM OF RETALIATION AGAINST EMPLOYEES WHO REPORT ALLEGED VIOLATIONS OF LAW?

VI. SHOULD THE ISSUE OF PUNITIVE DAMAGES UNDER BOTH 42 U.S.C. § 1983 AND THE TEXAS WHISTLEBLOWER ACT HAVE BEEN SUBMITTED TO THE JURY ABSENT A SHOWING OF MALICIOUS INTENT OR RECKLESS DISREGARD, AND, ALTERNATIVELY, WAS THE AWARD OF PUNITIVE DAMAGES GROSSLY EXCESSIVE AND UNREASONABLE?

VII. DID THE TEXAS WHISTLEBLOWER ACT PROVIDE FOR LIABILITY IN 1989 IF THE ALLEGED DISCRIMINATION WAS BASED ON A LATERAL TRANSFER, FROM THE DAY SHIFT IN THE INTELLIGENCE DIVISION TO THE NIGHT SHIFT IN THE PATROL DIVISION WITH GENUINE RESPONSIBILITIES AND DUTIES IN THE NEW POSITION AND WITH NO REDUCTION IN SALARY, RANK, GRADE, BENEFITS, OR LOSS OF PROMOTIONAL OPPORTUNITIES, AND IF THE REPORT OF ALLEGED VIOLATION OF LAW WAS NOT THE REASON FOR THE LATERAL TRANSFER?

PARTIES TO THIS PROCEEDING

The parties to this proceeding are as follows:

City of Dallas	Defendant-Petitioner
Willard Rollins	Defendant-Petitioner
Richard Hatler	Defendant-Petitioner
Mack Vines	Defendant Only
Jan Forsyth	Plaintiff-Respondent
Richard Kirks	Plaintiff-Respondent

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners City of Dallas, Texas, Willard Rollins, and Richard Hatler ("Petitioners" or "the City," "Rollins" and "Hatler") respectfully pray that this Honorable Court grant a writ of certiorari to review the judgment and denial of petition for rehearing issued March 31, 1997 and the opinion issued August 16, 1996 by the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit") in favor of Appellees Jan Forsyth and Richard Kirks ("Respondents" or "Forsyth" and "Kirks"). In support thereof, Petitioners respectfully show the Court as follows:

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS BELOW

The Fifth Circuit's opinion cited as *Forsyth v. City of Dallas*, 91 F.3d 769 (5th Cir. 1996), affirms the unreported opinion and the amended final judgment of the United States District Court for the Northern District of Texas, Dallas Division ("the district court").

STATEMENT OF JURISDICTION

Petitioners file this petition for writ of certiorari appealing from the Fifth Circuit's August 16, 1996 opinion and judgment, affirming the district court's judgment; Fifth Circuit's November 15, 1996 order, that Respondents' supplemental motion to amend the August 16,

1996 judgment be granted to the extent necessary to remand the attorneys' fees issue; Fifth Circuit's March 31, 1997 amended judgment issued as mandate; Fifth Circuit's March 31, 1997 order denying petition for rehearing; the district court's April 3, 1995 amended final judgment; and the district court's January 13, 25, and 27, 1995 oral and written orders denying Petitioners' motions for judgment as matter of law and objections to jury charge. This Court has jurisdiction under 28 U.S.C. §§1254(1) and 2106 to review on a writ of certiorari the Fifth Circuit's and district court's judgments.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case: U.S. Const. amend. I; U.S. Const. amend. XIV, §1; 42 U.S.C. §§1983 and 1988 (1994); Tex. Govt. Code §554.002 (West 1994) (amended 1995); and Tex. Gov't Code §§554.001-554.002 (West Supp. 1997). *See* App T.

STATEMENT OF THE CASE

1. Statement of Facts

This case presents important questions of federal law which include a public official's entitlement to qualified immunity. Respondents were partners in the Intelligence Division of the Dallas Police Department ("DPD"), and worked in an undercover investigation with an informant and with the Drug Enforcement Agency and Federal

Bureau of Investigation. Respondents filed this lawsuit against Petitioners complaining of their transfer from DPD Intelligence Division to DPD Patrol Division. DPD Internal Affairs Division ("IAD") investigated Respondents in September 1988 regarding a citizen's complaint that Forsyth had engaged in improprieties and corruption in an undercover investigation with Kirks, specifically that Forsyth arranged for DPD to drop a murder-for-hire case involving her informant, knew about and failed to report to the proper authorities a burglary committed by her informant, misrepresented information to a judge, had a sexual relationship with her informant, arranged for the dismissal of $30,000 in City fines pending against her informant, and that her informant would receive illegal drugs in an undercover drug transaction. IAD exonerated Respondents and gave Forsyth a copy of the report. Respondents complained to DPD, based on that report, that several DPD officers had engaged in illegal wiretapping.

Respondents contend DPD ignored their complaint. Respondents then "investigated" the wiretapping, recorded conversations with their superiors, and told their attorneys to "go public" with the IAD report. On February 5, 1989, *The Dallas Morning News* ran a front page article on Respondents' allegations. Beginning on February 7, 1989, Hatler, a member of Respondents' chain of command, expressed his concern to Respondents regarding their possible lack of objectivity and the appearance of their engaging in a personal vendetta should a criminal case be filed against the complaining citizen. Respondents testified that Rollins and Hatler told them to "stop the publicity" and threatened to transfer

them from the Intelligence Division if any further publicity ensued. On February 13, 1989, Respondents sued the City and DPD officers over the wiretaps[1], and *The Dallas Morning News* ran a story about the wiretap lawsuit the next day.

On February 15, 1994, Hatler transferred Respondents because of the lack of confidence that existed between Respondents and their chain of command, Respondents' personal involvement and possible vendetta in the investigation of the complaining citizen, the release of confidential information to individuals outside DPD regarding ongoing investigations and the names of informants and the potential effect on both the safety of the informants, and DPD's ability to maintain such investigations and informants in the future, and Respondents' deception with respect to notifying the chain of command of those against whom they intended to file suit regarding their claims of wiretapping. *See* App. Z and AA. When Forsyth and Kirks were transferred from the day shift in the Intelligence Division to the night shift in Patrol Division, they suffered no reduction in salary, rank, grade, benefits, or loss of promotional opportunities, and, as patrol officers for the City of Dallas, had genuine responsibilities and duties, and actually received increased responsibilities and pay as field training officers. *See* App. X and Y.

The case was tried to a jury from January 3-18, 1995. The court overruled Petitioners' Motion for Judgment as a Matter of Law and submitted the case to the jury on January 13,

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[1] In this related lawsuit, the Fifth Circuit affirmed the district court's dismissal of the wiretap lawsuit in *Forsyth v. Barr*, 19 F.3d 1527 (5th Cir. 1994).

1995. The jury returned a verdict for Respondents as follows: judgment for Kirks in the amounts of $75,000 for mental anguish, $80,000 for loss of past earnings, and $675,000 for future lost earning capacity, and judgment for Forsyth in the amount of $100,000 for mental anguish; judgment for Respondents in the amount of $125,000 in punitive damages against Petitioners under 42 U.S.C. §1983 and in the amount of $750,000 in punitive damages against the City under the Texas Whistleblower Act.

The district court entered its Order Denying in Part Defendants' Amended Renewed Motion for Judgment as a Matter of Law and Denying in Part Alternative Motion for New Trial on April 3, 1995 and deleted the $125,000 punitive damages award to Respondents against the City under 42 U.S.C. §1983, and deleted Kirks' awards of $80,000 for loss of past earnings and $675,000 for loss of future earning capacity. The district court entered its Amended Final Judgment on April 3, 1995, and Petitioners timely filed a notice of appeal on April 17, 1995. The Fifth Circuit affirmed the district court's judgment on August 16, 1996, and denied Petitioners' Petition for Rehearing and Suggestion for Rehearing en Banc and entered judgment on March 31, 1997.

2. Basis of Federal Jurisdiction in Court of First Instance

Jurisdiction in the court of first instance, the United States District Court for the Northern District of Texas, Dallas Division, is based on the following: 28 U.S.C. §1441; 28 U.S.C. §1331; 28 U.S.C. §1343(a); and 28 U.S.C. §1367(a).

ARGUMENT AND AUTHORITIES

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. A LATERAL TRANSFER OF EMPLOYEES, FROM THE DAY SHIFT IN THE INTELLIGENCE DIVISION TO THE NIGHT SHIFT IN THE PATROL DIVISION WITH GENUINE RESPONSIBILITIES AND DUTIES IN THE NEW POSITION AND WITH NO REDUCTION IN SALARY, RANK, GRADE, BENEFITS, OR LOSS OF PROMOTIONAL OPPORTUNITIES, DOES NOT AS A MATTER OF LAW CONSTITUTE AN ADVERSE EMPLOYMENT ACTION UNDER THE FIRST AMENDMENT.

As a matter of law, the lateral transfer at issue does not constitute an adverse employment action based on the facts presented in this case. Petitioners have found no case by this Court which has decided the important federal question of whether a lateral transfer, from the day shift in the Intelligence Division to the night shift in the Patrol Division with genuine responsibilities and duties in the new position and with no reduction in pay, rank, grade, benefits or loss of promotional opportunities, constitutes an adverse employment action. *Cf. Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (The Court only considered the denial of transfers to workplaces much closer to the employees' homes, resulting in longer hours and maintenance expenses. Thus, the denial of transfers had an adverse economic impact on the employees.) In this case, the jury was instructed that adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands. *See* App. W. The Fifth Circuit held that the lateral transfers in

this case were demotions because of Respondents' perception that the new positions were less prestigious and interesting, although the court conceded that a plaintiff's subjective perception is not enough to show that a demotion occurred. *Forsyth*, 91 F.3d at 774. The Fifth Circuit's holding that a lateral transfer to a position with no loss in pay, rank, grade, benefits or promotional opportunities and with genuine responsibilities and duties constitutes an adverse employment action under the First Amendment hands any disgruntled public employee transferred against his will a cause of action not previously recognized that the employee can and will use to intimidate his superiors and paralyze local governments. *See, e.g., Walsh v. Ward*, 991 F.2d 1334, 1346 (7th Cir. 1993). The Fifth Circuit's holding creates a right not previously recognized by this Court. This Court should accept certiorari and review this case because it has never held that such a transfer is actionable as an adverse employment action, and because the district court and the Fifth Circuit erred in denying Petitioners' motions for judgment as a matter of law.

This Court also should decide the important federal question presented because there is a clear conflict in the circuits whether a lateral transfer with no loss in pay and rank is an adverse employment action under the First Amendment. Several circuits hold that such a transfer is not an adverse employment action: *Rogers v. Miller*, 57 F.3d 986, 992 (11th Cir. 1995) (Adverse employment actions are defined as discharges, demotions, refusals to hire, refusals to promote, and reprimands.); *Pierce v. Texas Dep't of Criminal Justice, Institutional Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994); *Dahm v. Flynn*, 60 F.3d 253, 258 (7th

Cir. 1994) (The shifting of responsibilities in the plaintiff's job was not an obviously adverse action, such as termination, demotion, or loss in benefits or salary.); *Akers v. Caperton*, 998 F.2d 220 (4th Cir. 1993); *Agosto-De-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1218 (1st Cir. 1989) (A transfer which meant a limited blow to pride and would have increased unreimbursed commuting costs is not an adverse employment action.); *Bennis v. Gable*, 823 F.2d 723 (3rd Cir. 1987).

Other circuits hold that a transfer with no loss in pay and rank can be an adverse employment action: *Forsyth v. City of Dallas*, 91 F.3d 769 (5th Cir. 1996); *Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach*, 881 F.2d 816 (9th Cir. 1989); *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640 (8th Cir. 1983); *Rookard v. Health and Hosp. Corp.*, 710 F.2d 41 (2d Cir. 1983); *Childers v. Independent School Dist.*, 676 F.2d 1338, 1342 (10th Cir. 1982). This Court should decide this important federal question regarding lateral transfers to resolve the conflict among the circuits and to ensure uniformity of the law in the circuits.

II. A PUBLIC OFFICIAL IS ENTITLED TO QUALIFIED IMMUNITY WHEN HE LATERALLY TRANSFERS EMPLOYEES IF THE EMPLOYEES MAINTAIN GENUINE RESPONSIBILITIES AND DUTIES IN THE NEW POSITION AND SUFFER NO REDUCTION IN SALARY, RANK, GRADE, BENEFITS, OR LOSS OF PROMOTIONAL OPPORTUNITIES.

Rollins and Hatler have been denied their legal entitlement to qualified immunity as previously established by this Court. Public officials who act within the scope of

their discretionary authority and in the course of their official duties are entitled to the defense of qualified immunity, which shields them from suit as well as liability for civil damages, where their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *Malley v. Briggs*, 475 U.S. 335, 341 (1986). A police officer is entitled to qualified immunity if he can establish that his conduct was lawful in light of clearly established law and the information he possessed at the time of the action or conduct in question. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The relevant question is whether a reasonable officer **could have believed** that a defendant's action was lawful, in light of the clearly established law and the information possessed by the defendant. *Anderson*, 483 U.S. at 641. If officers of reasonable competence **could** disagree on whether an action is legal, immunity should be recognized. *Malley*, 475 U.S. at 341. In light of *Harlow* and *Anderson*, the question in this case is whether a reasonable officer **could** have believed that Petitioners' transfer of Respondents was lawful in light of clearly established law and the information they possessed. *See Anderson*, 483 U.S. at 641; *Malley*, 475 U.S. at 341.

A. The Law Must Be Clearly Established in a Particularized Sense.

The Fifth Circuit's **generalized** ruling in *Forsyth* that the law was clearly established that an officer could not retaliate against another for exercising First Amendment

rights is contradictory to United States Supreme Court rulings. "The right the official is alleged to have violated must have been 'clearly established' in a more **particularized**, and hence **more relevant** sense: The contours of the right must be sufficiently clear that a reasonable official would understand that **what he is doing** violates that right." *Anderson*, 483 U.S. at 640 (emphasis added). If the test of "clearly established law" were to be applied at a level of generality that bears no relationship to the " 'objective legal reasonableness' that is the touchstone of *Harlow*" and merely required, for example, that a plaintiff prove that a defendant's actions violated his due process rights, plaintiffs would be able to convert the "rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 639. Many general constitutional rights are clearly established and yet so general that it often will be unclear whether particular conduct violates the right. *See Anderson*, 483 U.S. at 639. The courts must ask whether the official acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed years after the fact. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). An official cannot reasonably be expected to be aware of a constitutional right that has not yet been declared. *Procunier v. Navarette*, 434 U.S. 555, 565 (1978).

This Court ruled for the first time that transfers were actionable under the First Amendment in 1990, when the Court dealt with transfers which had an economic impact on the one transferred, not with subjective beliefs regarding job assignments. *See Rutan*, 497 U.S. at 73-74. The

Fifth Circuit's ruling that the law was clearly established that a transfer from a position as senior corporal in the Intelligence Division to a position as senior corporal in the Patrol Division with no loss in salary, rank, grade, benefits, loss of promotional opportunities and with genuine responsibilities and duties in the new position is not supported by precedent of this Court.

Likewise, the Fifth Circuit's generalized ruling regarding qualified immunity conflicts with rulings of other circuit courts and with its own rulings. In deciding the question of whether a right is clearly established, the circuit courts hold that the right must be a particular right, which must be clearly established, and not a general or abstract principle, for an individual defendant not to be entitled to immunity. *Karnes v. Skrutski*, 62 F.3d 485, 491-92 (3rd Cir. 1995); *DiMeglio v. Haines*, 45 F.3d 790, 803 (4th Cir. 1995) ("The right must be sufficiently particularized to put potential defendants on notice that their conduct is probably unlawful."); *Hansen v. Soldenwagner*, 19 F.3d 573, 576 (11th Cir. 1994) ("When no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the **extraordinary** case where *Pickering* balancing would lead to the **inevitable** conclusion that the [act taken against] the employee was unlawful.") (emphasis in original); *Frank v. Relin*, 1 F.3d 1317, 1328 (2d Cir.), *cert. denied*, 510 U.S. 1012 (1993); *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992) ("Allegations of constitutional violations that require courts to balance competing interests may make it more difficult to find the law 'clearly established' when assessing claims of qualified immunity."); *White v. Walker*, 950

F.2d 972, 975 (5th Cir. 1991); *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991); *Busby v. City of Orlando*, 931 F.2d 764, 773-74 (11th Cir. 1991) (The Supreme Court has never established a bright-line test for determining when a public employee may be disciplined in response to that employee's speech.); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989); *Matherne v. Wilson*, 851 F.2d 752, 756-57 (5th Cir. 1988); *Hodorowski v. Ray*, 844 F.2d 1210, 1216-17 (5th Cir. 1988); *Muhammad v. Wainwright*, 839 F.2d 1422, 1424 (11th Cir. 1987); *Borucki v. Ryan*, 827 F.2d 836, 838 (1st Cir. 1987) ("Official has a presumptive knowledge of constitutional standards," but is "not expected to determine the manner in which the law's grey areas will be clarified and defined."); *Myers v. Morris* 810 F.2d 1437, 1458-59 n.16 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987) (To determine qualified immunity defense, it is not sufficient to focus merely on "whether the fourth, fifth, sixth and fourteenth amendment rights were clearly established," but the court must focus on the specific nature of the conduct complained of and state of the law with respect to identified conduct at time the official acted. "Qualified immunity would be meaningless if it could be defeated merely by the recitation of some well-recognized right and a conclusory allegation that the defendant infringed it.").

In contrast, at the time of the transfer in this case, the law **was** clearly established that the First Amendment permits a government employer to take action prior to the manifestation of disruption of the office and destruction of working relationships. *Connick v. Myers*, 461 U.S. 138, 152 (1983). The Fifth Circuit should have taken into account that the law **was** clearly established that in

weighing the interest of the employer against that of the employee, the government employer has an interest in regulating the speech of its employees that differs significantly from the interests it possesses in regulating the speech of the citizenry in general. *Waters v. Churchill*, 511 U.S. 661 (1994); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

B. A Defendant Enjoys Qualified Immunity if a Reasonable Officer Could Have Believed that the Lateral Transfers Were Lawful, in Light of Clearly Established Law and the Information He Possessed at the Time of the Transfers.

The Fifth Circuit's denial of qualified immunity in this case contradicts United States Supreme Court law and conflicts with the law of other circuits because if the contours of a plaintiff's federal rights and the official's permissible actions were clearly delineated at the time of the acts complained of, the defendant enjoys qualified immunity if his actions were objectively reasonable. *Anderson*, 483 U.S. at 641. The objective reasonableness of an official's conduct must be measured with reference to the law as it existed at the time of the conduct in question. *Harlow*, 457 U.S. at 818-19. An official could not reasonably be expected to anticipate subsequent legal developments. *Id.*

Rollins and Hatler transferred Respondents because of (1) the lack of confidence that existed between Respondents and their chain of command; (2) Respondents' personal involvement and possible vendetta in the investigation of the complaining citizen; (3) the release of

confidential information to individuals outside DPD regarding ongoing investigations and the names of informants and the potential effect on both the safety of the informants and DPD's ability to maintain such investigations and informants in the future; and (4) Respondents' deception in violation of the DPD General Orders with respect to notifying the chain of command of those against whom they intended to file suit regarding Respondents' claims of wiretapping. *See* App. Z and AA. It was objectively reasonable for Rollins and Hatler to transfer Kirks and Forsyth without fear of violating the law since the law was not clearly established in 1989 that lateral transfers were adverse employment actions. In addition, the law was clearly established that (1) a government employer could take action prior to the manifestation of disruption of the office and destruction of working relationships, *Connick*, 461 U.S. at 152; and (2) the government has an interest as an employer in regulating the speech of its employees that differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general. *Pickering*, 391 U.S. at 568.

Additionally, the Fifth Circuit's *Forsyth* holding is contrary to case law of other circuits. *See Karnes*, 62 F.3d at 491-92; *DiMeglio*, 45 F.3d at 803; *Frank*, 1 F.3d at 1328; *Medina*, 960 F.2d at 1497-99; *Busby*, 931 F.2d at 773-74; *Hodorowski*, 844 F.2d at 1216; *Borucki*, 827 F.2d at 838; *Myers*, 810 F.2d at 1459 n.16; *Kompare v. Stein*, 801 F.2d 883, 887 (7th Cir. 1986).

C. If Reasonable Public Officials Could Differ on the Lawfulness of Petitioners' Actions, They Are Entitled to Qualified Immunity.

Petitioners are entitled to qualified immunity if reasonable public officials could differ on the lawfulness of their actions. *Malley*, 475 U.S. at 341. If Rollins and Hatler were mistaken in their judgment whether a lateral transfer was permissible under the circumstances in 1989, they are entitled to qualified immunity if their decision was reasonable, although mistaken. *Anderson*, 483 U.S. at 641. The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Hunter*, 502 U.S. at 229; *Malley*, 475 U.S. at 341, 343. This accommodation for reasonable error exists because "officials should not err always on the side of caution" for fear of a lawsuit. *Davis*, 468 U.S. at 196. The issue is whether a reasonable official **could** have believed his conduct was lawful, not whether a reasonable official **would** have believed his conduct was lawful. In light of the reasons Respondents were transferred, a reasonable official **could** have believed that Rollins and Hatler's actions were lawful and thus were entitled to qualified immunity. *See Anderson*, 483 U.S. at 641. The Fifth Circuit's *Forsyth* decision is directly contrary to Supreme Court decisions, and this Court should grant review of this case.

D. The District Court Erred by Refusing to Grant Defendants' Motions for Judgment as a Matter of Law Regarding Defendants' Right to the Defense of Qualified Immunity.

The district court erred by refusing to grant Respondents' motions for judgment as a matter of law regarding qualified immunity because a reasonable officer could have concluded that the transfer of Kirks and Forsyth was lawful in light of clearly established law and the information possessed by Rollins and Hatler at the time of the transfer. The district court's denial of Petitioners' motions for judgment as a matter of law regarding qualified immunity is contrary to the protections afforded by this Court in *Harlow, Malley,* and *Anderson*. The district court's denial of Petitioners' motions deprived them of the protection of law established by this Court, and caused them to be held individually liable in the amount of $125,000. Therefore, this Court should review this case so that it can vacate the Fifth Circuit's opinion affirming the District court's denial of Petitioners' motions for judgment as a matter of law and reverse and render judgment for Petitioners Rollins and Hatler.

E. Alternatively, Triable Issues of Fact Exist Regarding the Qualified Immunity Defense That Should Be Presented to the Jury.

The Fifth Circuit's failure to address the district court's refusal to submit the instruction and issue of qualified immunity to the jury is contradictory to opinions of this Court and of other circuits. This refusal

denies Rollins and Hatler their right to qualified immunity, which is a defense to which they are entitled as a matter of law because fact issues for a jury existed. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (*quoting First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)); *Karnes*, 62 F.3d at 491; *Oliveira v. Mayer*, 23 F.3d 642, 649 (2d Cir. 1994), *cert. denied*, 513 U.S. 1076 (1995); *Frank*, 1 F.3d at 1328; *ACLU v. Wicomico County, Md.*, 999 F.2d 780, 785 (4th Cir. 1993); *White v. Walker*, 950 F.2d at 975; *Hurlman v. Rice*, 927 F.2d 74, 78 (2d Cir. 1991); *Thorsted v. Kelley*, 858 F.2d 571, 575 (9th Cir. 1988). Respondents contend that the failure to submit the triable issues of fact to the jury resulted in manifest injustice to Rollins and Hatler.

The factual disputes were whether a job in the intelligence unit is more prestigious and whether a reasonable police officer would have known at the time of the transfer that the lateral transfers constitute an adverse employment action under the First Amendment. The Fifth Circuit should have held that it was reversible error not to submit the factual issues to the jury.

III. A SPEAKER'S MOTIVATION OR INTEREST IN "SPEAKING OUT" IS A DETERMINATIVE FACTOR IN DECIDING WHETHER THE SPEECH ADDRESSES A MATTER OF PUBLIC CONCERN.

Under this Court's existing precedent, to determine the important federal question whether speech addresses a matter of public concern, a court must decide a

speaker's motivation or interest in "speaking out." *See Connick*, 461 U.S. at 147. The Fifth Circuit ruled that Respondents' speech in complaining about their supervisors addressed a matter of public concern by cursorily determining that their primary motivation was not personal. This ruling is in direct conflict with existing Supreme Court precedent. Respondents' personal employment dispute centered around their desire to restore their reputation pursuant to the wiretap allegations by which they believed they had been damaged; their belief that there was an insidious conspiracy against them; and their lawsuit for damages against individuals, seeking millions of dollars. *See* App. X and Y. A public employee's speech is **not protected** when the employee speaks as a citizen on a matter of general concern that is **tied to a personal employment dispute.** *Connick*, 461 U.S. at 147, 148 n.8; *Terrell v. Univ. of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). As a matter of law the Fifth Circuit should have ruled for Petitioners and held that the "speaking out" was not a matter of public concern because Respondents' statements were necessarily tied to a personal employment dispute.

This Court also should address this issue because there is a conflict among the circuits whether a speaker's motivation or interest in speaking out is a determinative factor in whether the speech addresses a matter of public concern, and because the Fifth Circuit's ruling is inconsistent with its own precedent. Several circuits consider the speaker's motivation when determining whether speech addresses a matter of public concern: *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996); *Johnson v. Clifton*, 74 F.3d 1087, 1092 (11th Cir.), *cert. denied*, ___ U.S. ___, 117

S.Ct. 51, 136 L.Ed.2d 15 (1996) (Speech is not protected by the First Amendment if motivated by personal concerns instead of public concerns.); *DiMeglio*, 45 F.3d at 805; *Smith v. Fruin*, 28 F.3d 646, 652 (7th Cir. 1994), *cert. denied*, 513 U.S. 1083 (1995); *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) (The fact that employee's speech touches on matters of public concern will not render that speech protected where the employee's motive for the speech is private and personal.); *Gillum v. City of Kerrville*, 3 F.3d 117, 121 (5th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994); *Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197, 1198 (8th Cir. 1993) (The determination of whether speech addresses a matter of public concern focuses on the employee's role in conveying the speech, including the employee's motivation in speaking, rather than the public's interest in the speech's topic.); *Fiorillo v. U.S. Dep't of Justice, Bureau of Prisons*, 795 F.2d 1544, 1550 (Fed. Cir. 1986) (For speech to address a matter of public concern, the speaker's primary motivation must be a desire to inform the public on matters of public concern and not public vindictiveness.).

Other circuits determine whether the speech addresses a matter of public concern, regardless of the speaker's motivation. *Johnson v. Multnomah County*, 48 F.3d 420, 425 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2616, 132 L.Ed.2d 858 (1995); *Davis v. Ector County, Texas*, 40 F.3d 777, 782 (5th Cir. 1994); *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994); *O'Connor v. Steeves*, 994 F.2d 905, 914 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993); *Zamboni v. Stamler*, 847 F.2d 73, 78 (3rd Cir. 1988), *cert. denied*, 488 U.S. 899 (1988); *McMurphy v. City of Flushing*, 802 F.2d 191, 197 (6th Cir. 1986). This Court should grant certiorari

to review and reverse the Fifth Circuit's opinion, which at best addressed Respondents' motivation in a cursory manner, and which is contrary to this Court's rulings and conflicts with rulings of other circuits.

IV. THE *PICKERING* BALANCE DOES NOT REQUIRE A SHOWING OF ACTUAL DISRUPTION IN THE WORKPLACE, BUT ONLY A SHOWING OF A POTENTIAL DISRUPTION OF, OR LIKELY INTERFERENCE WITH, THE EFFICIENCY OF THE WORKPLACE BEFORE THE EMPLOYER MAY TAKE EMPLOYMENT ACTION.

The Fifth Circuit's opinion in this case is in direct conflict with several opinions of this Court because a showing of actual disruption of the workplace is not necessary prior to taking employment action. This Court has consistently held that reasonable **predictions** of disruption are sufficient to justify restrictions on employee speech. *Waters v. Churchill*, 511 U.S. 661, 128 L.Ed.2d 686, 698-99 (1994) (Few cases involve tangible, present interference with the agency's operation. "The danger in them is mostly speculative. . . . [S]ubstantial weight is given to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern. . . . [C]onstitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign. . . . When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government

employer must have some power to restrain her."); *Connick*, 461 U.S. at 152 (It is not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."); and *Board of County Commissioners v. Umbehr*, 518 U.S. ___, 135 L.Ed.2d 843, 852 (1996) and *United States v. National Treasury Employees Union*, 513 U.S. ___, 130 L.Ed.2d 964, 985 n.21 (1995) (Government predictions of harm used to justify restrictions of employee speech are given great deference.). The Fifth Circuit's ruling that the significance of Respondents' speech outweighed the department's efficiency concerns[2] because no defense witness testified that Respondents' speech "undermined the [department's] operations," necessarily holds that the department's operations must be undermined before taking action against the employee, and this Court has never required such proof of actual disruption in the workplace. This is particularly true in paramilitary organizations. *See Kelley v. Johnson*, 425 U.S. 238 (1976) (A police department may have a legitimate interest in promoting esprit de corps.); *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980), *cert. denied*, 452 U.S.

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[2] That the need for trusted relationships between superiors and subordinates is paramount in the often covert, dangerous, and sensitive field of intelligence and undercover operations is undisputed. Respondents' chain of command knew that they lost trust and confidence in them, as evidenced by Respondents' preparing an "indictment" against their superiors and clandestine taping of their conversations with their superiors, demonstrating that a destructive breakdown in the working relationship had occurred. *See* App. Z and AA.

926 (1981) (The court found that the "threat of disruption" was great and that discipline is important to a quasi-military organization.).

V. A MUNICIPALITY CANNOT BE HELD LIABLE UNDER 42 U.S.C. §1983 IF THE DISTRICT COURT HELD THAT NO INDIVIDUAL DEFENDANT WAS A POLICYMAKER, AND RESPONDENTS FAILED TO ESTABLISH THAT THE CITY HAD A POLICY OR CUSTOM OF RETALIATION AGAINST EMPLOYEES WHO REPORT ALLEGED VIOLATIONS OF LAW.

The Fifth Circuit's failure to address the district court's finding of liability of the City, based in part upon 42 U.S.C. §1983, is contradictory to this Court's rulings and raises an important federal question. As a matter of law, the evidence was insufficient to hold the City liable under §1983. A municipality can be sued and subjected to monetary damages under §1983 only if its official policy or custom causes a person to be deprived of a federally protected right. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978).

Respondents established neither a policy nor a custom (long-standing, widespread practice) of retaliation by the City. The action of an individual official may be a basis for holding a municipality liable only if the official has policymaking authority. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-482 (1986); *Monell*, 436 U.S. at 694. Policymaking authority means final authority to establish municipal policy with respect to the action ordered. *Pembaur*, 475 U.S. at 481-482. A city employee is not a policymaker unless the city, through its lawmakers, has

delegated exclusive policymaking authority to that employee and cannot review the action taken by the employee. *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

The district court correctly held that Vines, Rollins, and Hatler were not policymakers. The uncontroverted evidence at trial established that the City has an officially adopted policy forbidding retaliation against employees for seeking redress against a superior. No evidence was presented by Respondents that the City had a policy or custom of retaliation. Thus, the issue should never have been submitted to the jury. The district court's failure to grant Petitioners' motions for judgment as a matter of law and submission of this issue to the jury, and the Fifth Circuit's failure to address §1983 resulted in the improper finding of liability against the City. This Court should review this case. Finally, this Court should review this case because the Fifth Circuit's failure to review the City's liability under §1983, coupled with its improper finding of liability of the City under the Texas Whistleblower Act, results in a gross miscarriage of justice. *See* Section VII, *infra*.

VI. THE ISSUE OF PUNITIVE DAMAGES UNDER BOTH 42 U.S.C. §1983 AND THE TEXAS WHISTLEBLOWER ACT SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY ABSENT A SHOWING OF MALICIOUS INTENT OR RECKLESS DISREGARD, AND, ALTERNATIVELY, THE AWARD OF PUNITIVE DAMAGES WAS GROSSLY EXCESSIVE AND UNREASONABLE.

The Fifth Circuit's opinion in *Forsyth* is in direct conflict with this Court's opinions regarding the standard for awarding punitive damages under 42 U.S.C. §1983. No basis for an award of punitive damages exists where the evidence establishes that a defendant did not act with a malicious intent to deprive a plaintiff of his rights or do him injury and the inclusion of this issue resulted in an improper verdict against defendants. *Carey v. Piphus*, 435 U.S. 247 (1978). A jury may be permitted to assess punitive damages in an action under §1983 when the defendants' conduct is motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. *Smith v. Wade*, 461 U.S. 30, 56 (1983); *City of Newport v. Fact Concerts, Inc.* 453 U.S. 247, 266-67 (1981). Punitive damages are available only on a showing of the requisite intent. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986).

The jury question for punitive damages was based on whether the jury found **liability** under Jury Question Numbers 2 and 3, not on whether the jury found **malice or reckless or callous disregard** of Respondents' rights by Petitioners. There was no showing of malicious intent or reckless disregard of Respondents' rights because the

transfer was not an adverse employment action, and Rollins and Hatler did not violate clearly established law of which a reasonable person would have known. Hatler and Rollins, and thereby the City, reasonably transferred Respondents because of potential disruption and extreme tension in the workplace and Respondents' lack of confidence in their chain of command. The jury's finding that the wiretap lawsuit against Rollins and other officers was not a factor in the decision to transfer Respondents demonstrates that no ill will or callous indifference existed on behalf of Rollins and Hatler. A scintilla of evidence to submit this issue to the jury is insufficient to present a question to the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Alternatively, the great weight of the evidence established that the verdict as to punitive damages was grossly excessive and unreasonable. *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 503 U.S. 1011 (1992).

Punitive damages were also improperly awarded against the City under the Texas Whistleblower Act ("the Act"), Tex. Gov't Code Ann. §554.002 (Vernon's 1993), because there was no showing of malicious intent or reckless disregard of Respondents' rights. Punitive damages may be awarded only if Petitioners acted on the "basis of an aggravated mental state, such as intent, recklessness, or gross negligence, that involved either deliberate and purposeful injury to [Respondents] or actual subjective awareness that serious injury is highly probable." *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 19 (Tex. 1994). The punitive damages assessed were so excessive that the verdict appears to be based on passion or prejudice rather than a reasoned finding based on the

evidence. A new trial is the proper remedy. *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597 (5th Cir. 1986), *cert. denied*, 488 U.S. 848 (1988). Since there is no evidence supporting a finding of malice on behalf of any Petitioner in this case, no evidence exists supporting an award of punitive damages against the City under the Act. *City of Ingleside v. Kneuper*, 768 S.W.2d 451, 457 (Tex.App.-Austin 1989, writ denied). This Court should grant certiorari to review and vacate the Fifth Circuit's opinion and render judgment for Petitioners.

VII. THE TEXAS WHISTLEBLOWER ACT DID NOT PROVIDE FOR LIABILITY IN 1989 IF THE ALLEGED DISCRIMINATION WAS BASED ON A LATERAL TRANSFER, FROM THE DAY SHIFT IN THE INTELLIGENCE DIVISION TO THE NIGHT SHIFT IN THE PATROL DIVISION WITH GENUINE RESPONSIBILITIES AND DUTIES IN THE NEW POSITION AND WITH NO REDUCTION IN SALARY, RANK, GRADE, BENEFITS, OR LOSS OF PROMOTIONAL OPPORTUNITIES, AND IF THE REPORT OF THE ALLEGED VIOLATION OF LAW WAS NOT THE REASON FOR THE LATERAL TRANSFER.

This Court should grant certiorari to decide this issue because the Fifth Circuit found the City liable under the Texas Whistleblower Act but refused to decide the important federal question of the City's liability for the same acts under 42 U.S.C. §1983, and Petitioners have no other avenue of appealing the manifestly unjust ruling of the Fifth Circuit. This Court should also grant certiorari because the Fifth Circuit's opinion regarding the City's liability under the Act is contrary to well established law

by the highest court of the State of Texas. This Court can review the Fifth Circuit's opinion regarding Respondents' claims under the Act, since the district court assumed supplemental jurisdiction over these claims which arose out of a common nucleus of operative facts, and the Fifth Circuit issued judgment regarding these claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); 28 U.S.C. §§1331, 1441, 1254.

To recover under the Act in 1989, a plaintiff must show that he was suspended, terminated, or otherwise discriminated against for reporting a violation of law. Tex. Gov't Code Ann. §554.002 (West 1994) (amended 1995). As a matter of law, Respondents' transfer was not an adverse employment action. *See* Section I, *supra*, authorities cited regarding adverse employment action. The Act provides no legally sufficient basis in this case that Respondents were discriminated against by being transferred.

The Fifth Circuit supported its interpretation that the Act included transfers by stating that "the Texas legislature has since amended [the Act] to clarify that it covers transfers," *Forsyth*, 91 F.3d at 776; however, the new Act specifically changed the definition of adverse employment action to include transfers. Tex. Gov't Code §§554.001-002 (West Supp. 1997). The court's holding that an amendment to the Act, effective June 15, 1995, applied to a transfer that occurred in 1989 is directly contrary to the amended Act. The amended Act **adds** "transfers" and substitutes "adverse employment action" for "discriminates against" **after** the transfers in this case occurred. The Act is **not** retroactive and specifically states, "[t]he

changes in law made by this Act apply only to a suspension or termination of employment of a public employee or to other adverse personnel action taken against a public employee on or after the effective date of this Act." Tex. Gov't Code §§554.001 historical note (West Supp. 1997) [Act of June 15, 1995, 74th Leg., ch. 721, §1].

Moreover, the Fifth Circuit's suggestion that its interpretation of the Act as it applied to events in 1989 is somehow validated by an amendment that was enacted in 1995 is plainly contrary to the well-established rule of statutory construction that "when the legislature amends a law, it is presumed that it intends to change the law." *American Surety Co. of New York v. Axtell Co.*, 120 Tex. 166, 36 S.W.2d 715 (Tex. 1930). The legislature's amendment of the law to cover transfers in 1995 necessarily establishes that the law did **not** cover transfers in 1989. *See* Tex. Govt. Code §554.001(3) (West Supp. 1997). To hold otherwise requires a quantum leap in logic.

Finally, as a matter of law, Respondents should not have recovered under the Act because they did not establish that the report made to DPD (an appropriate law enforcement authority) was **the** reason for the transfer. Respondents' testimony established that their retaliation claim was based on a report to the press and the lawsuit, *see* App. BB, CC. The jury found that the lawsuit was not a factor in the transfer. *See* App. W. The Fifth Circuit necessarily established that Respondents were transferred two days after the news article about their lawsuit, and that Forsyth and Kirks "contend" that their complaints to DPD about the alleged wiretaps were ignored. *Forsyth*, 91 F.3d at 772. The Fifth Circuit did not address the City's liability under §1983, and only found liability

under the Act based on the report to the media. While a finding of liability under §1983 could be based on a report to the press, if all other §1983 elements are met, "[t]he media is not an appropriate 'law enforcement authority' under the Whistleblower Act." *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 145 (Tex. 1995). Since Respondents did not show the requisite causal connection, a necessary element of their whistleblower claim is missing, and no liability was established; thus, the award of $750,000 in punitive damages against the City under the Act is without legal basis.

The Fifth Circuit did not cite a single Texas case for the proposition that lateral transfers would be considered to be either a demotion or discrimination by the Texas courts. The cases cited by the Fifth Circuit deal with transfers, but do not address this vital issue. The Fifth Circuit held (based on its authority to decide **federal** law under §1983) that "the evidence established that Forsyth and Kirk's transfers constituted demotions." *Forsyth*, 91 F.3d at 776. The Fifth Circuit then concluded that a demotion was discrimination under the Whistleblower Act, **although none of the cited cases addresses that issue.** The Fifth Circuit created a basis for recovery which Respondents did not have under federal or state law in 1989, and this Court should review the case.

CONCLUSION

If the Fifth Circuit's ruling is not reviewed by this Court, important federal questions and conflicts among the circuits will not be addressed, and failure to review

the rulings in this case will severely impact and unnecessarily burden financial resources of all local governments within the Fifth Circuit because the Fifth Circuit has created a right of recovery not previously recognized by this Court. For the reasons stated herein, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari, to review and reverse the opinion of the Fifth Circuit and render judgment in favor of Petitioners in all respects and on all issues, and, alternatively, review and remand this case for a new trial for the reasons stated herein, and for such other and further relief, at law and in equity, to which Petitioners show themselves justly entitled.

Respectfully submitted,

CITY ATTORNEY OF THE CITY OF DALLAS

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APPENDIX A

91 F.3d 764 (5th Cir. 1996)
Jan FORSYTH, Richard Kirks,
Plaintiffs-Appellees Cross-Appellants,

v.

CITY OF DALLAS, TX, et al., Defendants,

City of Dallas, TX, Willard Rollins, Richard Hatler,
Defendant-Appellant Cross-Appellee.

No. 95-10360.

United States Court of Appeals,
Fifth Circuit.

Aug. 16, 1996.

Police officers, who were transferred from intelligence unit to night uniformed patrol after making allegations of illegal wiretapping within police department, sued city and individual defendants for retaliation in violation of First Amendment, § 1983, and Texas Whistleblower Act. The United States District Court for the Northern District of Texas, Robert B. Maloney, J., entered judgment against defendants for actual and exemplary damages and attorney fees and costs, but granted judgment as matter of law to defendants on one officer's claim for lost wages. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) officers engaged in conduct protected by First Amendment; (2) transfers constituted demotions which deprived officers of cognizable property right, even without reducing officers' pay; (3) evidence supported awards of $100,000 and $75,000, respectively, in emotional anguish damages and $125,000 in exemplary damages against supervisors who ordered transfers; (4) supervisors were not entitled to qualified immunity; (5) city was liable for officers' transfers under Texas Whistleblower Act; (6) $750,000 exemplary damage

award against city under Whistleblower Act was permissible; (7) officer's speculative testimony did not support lost wages claim; and (8) attorney fee awards were not unreasonable.

Affirmed.

See also, 19 F.3d 1527.

Douglas R. Larson, Russell Howard Daniels, Law Office of Douglas R. Larson, Mesquite, TX, for Forsyth and Kirks.

Sam A. Lindsay, City Attorney, Fritz Joseph Aldrine, II, Associate City Attorney, Office of the City Attorney for the City of Dallas, Dallas, TX, Janice Smith Moss, Assistant Attorney General, City Attorney's Office, City of Dallas, Dallas, TX, for City of Dallas, TX, Rollins and Hatler.

Bill Boyd, McKinney, TX, for Vines.

Appeals from the United States District Court for the Northern District of Texas.

Before POLITZ, Chief Judge, and JONES and BARKSDALE, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Jan Forsyth and Richard Kirks were veteran undercover detectives in the Intelligence Unit of the Dallas Police Department ("DPD"). They alleged, both to superior officers in the DPD and later to the media, that several high-ranking DPD officers had participated in

illegal wiretapping that interfered with a sensitive undercover investigation. After the *Dallas Morning News* ran two articles about their allegations, Forsyth and Kirks were transferred from the Intelligence Unit to night uniformed patrol. Forsyth and Kirks sued the City of Dallas ("the City"), and Officers Willard Rollins, Richard Hatler, and Mack Vines for retaliating against them in violation of 42 U.S.C. § 1983 and the Texas Whistleblower Act, TEX.CIV.STAT.ANN. art. 6252-16a (1992), because they had exercised their First Amendment rights to free speech. After a jury trial, the district court entered judgment against the City, Rollins, and Hatler, assessing a total of $175,000 in actual damages, $1 million in exemplary damages, and $153,470 in attorneys' fees and costs. The district court granted judgment as a matter of law to the defendants on Kirks's claim for lost wages. Both sides now appeal. We affirm the district court's judgment.

I. BACKGROUND

At the time of this suit, Forsyth and Kirks were conducting an undercover drug "sting" in conjunction with the Federal Bureau of Investigation and the Drug Enforcement Agency. Through a complex series of events related to the sting, a Dallas lawyer (Barr) and a politically influential Dallas businessman (Grogan) decided to level a complaint against Forsyth and Kirks with the DPD. The Internal Affairs ("IA") division of the DPD investigated the complaint and exonerated Forsyth and Kirks. A copy of the IA report was given to Forsyth.

From this report, Forsyth and Kirks formed a belief that several high-ranking officers within the DPD had

engaged in illegal wiretapping. They complained about the alleged wiretaps to several superior officers in the DPD. Forsyth and Kirks contend their complaints were ignored.

Subsequently, Forsyth and Kirks turned the IA report over to their attorneys and instructed the attorneys to "go public" with their allegations that several high-ranking DPD officers had engaged in illegal wiretaps. On February 5, 1989, the *Dallas Morning News* ran a front page article about Forsyth's and Kirks's allegations. Two days later, Forsyth and Kirks were called to a meeting with their supervisors, Chief Rollins and Assistant Chief Hatler. Forsyth and Kirks testified that Rollins and Hatler told them to "stop the publicity" and threatened to transfer them from the Intelligence Unit if any further publicity ensued.

On February 13th, Forsyth and Kirks sued the City, Rollins, and several other officers over the illegal wiretaps ("the wiretapping suit").[1]

On February 14th, the *Dallas Morning News* ran an article about the wiretapping suit. The next day, Forsyth and Kirks were transferred from the Intelligence Unit to night uniformed patrol. Rollins and Hatler requested the transfer, and Vines approved it. Although Forsyth's and Kirks's pay was not reduced because of the transfers, they considered their new positions to be demotions.

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[1] The wiretapping suit was dismissed by the district court and the Fifth Circuit affirmed, *Forsyth v. Barr*, 19 F.3d 1527 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 195, 130 L.Ed.2d 127 (1994).

They had each begun their careers, thirteen and nineteen years previously, in night uniformed patrol.

Forsyth and Kirks filed the instant suit alleging that the City and Rollins, Hatler, and Vines had retaliated against them for complaining to superior DPD officers about the alleged wiretapping, for publicizing their wiretapping allegations, and for filing the wiretapping suit, in violation of the First Amendment, § 1983, and the Whistleblower Act, *supra*. At trial, the jury found that (1) the officers' transfers constituted adverse employment actions; (2) Forsyth and Kirks were transferred because they had complained to superior officers about the alleged wiretaps and because they had publicized their allegations to the press; (3) Forsyth and Kirks were not transferred because they had filed the wiretapping suit; (4) Forsyth and Kirks had made the internal DPD wiretapping complaints in good faith; (5) the City had a *de facto* official policy of permitting the DPD to retaliate against whistleblowers; and (6) Vines was not liable for retaliating against Forsyth and Kirks.

As damages, the jury found that (1) Kirks had suffered $50,000 in past mental anguish, $25,000 in future mental anguish, $80,000 in past lost wages, and $675,000 in future lost wages; (2) Forsyth had suffered $75,000 in past mental anguish and $25,000 in future mental anguish; (3) $125,000 in exemplary damages each should be assessed against Rollins and Hatler under § 1983; and (4) $125,000 in exemplary damages was owed by the City under § 1983 and $750,000 under the Whistleblower Act.

The district court eliminated the jury's award for Kirks's lost wages and the § 1983 exemplary damages

against the City. The court entered judgment that (a) Rollins, Hatler, and the City were jointly and severally liable under § 1983 for Forsyth's and Kirks's mental anguish, or alternatively, the City was liable under the Whistleblower Act for those damages; (b) Rollins and Hatler were each liable under § 1983 for $125,000 in exemplary damages; and (c) the City was liable under the Whistleblower Act for $750,000 in exemplary damages. The district court also awarded the officers attorneys' fees and costs.

II. DISCUSSION

A. Rollins and Hatler

The City, Rollins, and Hatler contend the district court erred in determining that the City and the officers had violated § 1983 by retaliating against Forsyth and Kirks because they had exercised their First Amendment rights to free speech. We will not address the troublesome question of the City's § 1983 liability because, as discussed later, the City is alternatively liable under the Whistleblower Act. Rollins's and Hatler's § 1983 contentions are unconvincing.

Rollins and Hatler first assert that Forsyth and Kirks did not engage in conduct protected by the First Amendment. Contrary to the defendants' arguments, Forsyth and Kirks offered unrebutted testimony that they instructed their lawyers to publicize the wiretapping allegations. Further, it does not appear that Forsyth and Kirks were primarily motivated by personal and not public concerns in publicizing their allegations. At the time they "spoke out," Forsyth and Kirks had been exonerated

by the IA report. Although the plaintiffs' disputes with DPD may have influenced their decision to speak out, the *Dallas Morning News* articles about their allegations discussed matters of public concern. The public would want to know of charges that influential citizens were taking advantage of their relationships with the police, even to the extent of conducting their own wiretaps. Moreover, balancing the significance of the speech against the employer's efficiency concerns, as *Connick*[2] requires, does not turn out favorably for Rollins and Hatler. No defense witness testified that Forsyth's and Kirks's publication of the wiretapping allegations undermined the DPD's operations. To the contrary, those witnesses testified that the newspaper articles did not affect the Department's efficiency.

Second, Rollins and Hatler contend that the evidence was insufficient to prove that they transferred Forsyth and Kirks because of their complaints internally and then through the media about the alleged wiretapping. Forsyth and Kirks testified that, two days after the first *Dallas Morning News* article appeared, Rollins and Hatler warned them to "stop the publicity" and threatened to transfer them if further publicity ensued. The day after the second newspaper article appeared, Rollins and Hatler transferred the plaintiffs.

Third, Rollins and Hatler contend that the transfers did not deprive Forsyth and Kirks of any cognizable property right or privilege because their pay was not

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[2] *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

reduced. This court has already rejected that argument under strikingly similar facts. In *Click v. Copeland*, 970 F.2d 106 (5th Cir.1992), two sheriff's deputies were transferred from the county's law enforcement section to positions as jail guards because they had engaged in conduct protected by the First Amendment. The employees suffered no reduction in pay. However, they contended their transfers were demotions because the jail guard positions were much less desirable then [sic] their previous ones. This court agreed that their transfers constituted demotions in violation of § 1983. As this court explained:

> Copeland maintains that his transfer of Click and Falcon to the jail was not a demotion because neither received a decrease in pay; in fact Falcon received a raise. Money alone, however, does not buy happiness. The *Perry* Court spoke of "benefits" generally, not just salary [citing *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697-98, 33 L.Ed.2d 570 (1972)]. The evidence adduced at trial strongly supports the proposition that jobs in the jail are not as interesting or prestigious as jobs in the law enforcement section. . . . In short, Click and Falcon's transfers could be considered demotions even though they suffered no reduction in salary.

970 F.2d at 109. *See also Fyfe v. Curlee*, 902 F.2d 401, 404 (5th Cir.), *cert. denied*, 498 U.S. 940, 111 S.Ct. 346, 112 L.Ed.2d 310 (1990) (holding that a transfer to a less desirable but equally paying job constituted a demotion).

Click does not support the proposition that every transfer of job duties without a decrease in salary is necessarily a demotion because it occurs following a

plaintiff's exercise of protected speech; a plaintiff's subjective perception that a demotion has occurred is not enough. Here, however, the evidence revealed that the Intelligence Unit positions were more prestigious, had better working hours, and were more interesting than night patrol. Moreover, few officers voluntarily transferred from the Intelligence Unit to night patrol and other officers had been so transferred as punishment.

Fourth, Rollins and Hatler contend that the evidence was insufficient for a reasonable jury to conclude that Forsyth and Kirks suffered $100,000 and $75,000 respectively in emotional anguish. We disagree. Forsyth testified that she suffered depression, weight loss, intestinal troubles, and marital problems, that she had been sent home from work because of her depression, and that she had to consult a psychologist. Kirks testified that he suffered depression, sleeplessness, and marital problems. Judgments regarding noneconomic damages are notoriously variable; we have no basis to reverse the jury's evaluation.

Fifth, Rollins and Hatler contend the evidence was insufficient to support the jury's award of $125,000 in exemplary damages against each of them. We disagree; Forsyth and Kirks presented sufficient evidence from which a reasonable jury could conclude that Rollins and Hatler acted with malice or a reckless or callous disregard for the plaintiffs-appellees' rights. *See Wells v. Hico Indep. Sch. Dist.*, 736 F.2d 243, 259 (5th Cir.1984), *cert. dismissed*, 473 U.S. 901, 106 S.Ct. 11, 87 L.Ed.2d 672 (1985). Rollins and Hatler knew they could not demote Forsyth and Kirks for exercising their First Amendment rights, yet the

evidence, viewed in the light most favorable to the verdict, strongly corroborates the jury's finding that they did so. Moreover, the $125,000 awards are not excessive: each is less than Forsyth's and Kirks's actual damages.

Sixth, Rollins and Hatler contend the jury's finding that Vines was not liable is inconsistent with its finding that they were liable. We disagree. Vines testified that he had approved Forsyth's and Kirks's transfers based on the information he received from Rollins and Hatler and that he routinely approved transfers recommended by superior officers. A reasonable jury could find that Vines did not retaliate against Forsyth and Kirks because he was not personally involved in their dispute and signed the transfer papers based on information from the co-defendants. The jury's finding that Rollins and Hatler had constitutionally offensive motives for the transfers does not imply or impute the same disposition to Vines.

Finally, Rollins and Hatler contend the district court erred in rejecting their defense of qualified immunity. *Click* held, however, that "[t]he law was established clearly enough in this circuit in January 1988 that a reasonable officer should have known that if he retaliated against an employee for exercising his First Amendment rights, he could not escape liability by demoting and transferring the employee rather than discharging him." 970 F.2d at 111. The retaliatory transfers at issue here took place a year later.

In sum, we affirm the district court's judgment against Rollins and Hatler under § 1983 and the accompanying damage awards for violating Forsyth's and Kirks's First Amendment rights.

B. The City of Dallas

The district court found that the City was jointly and severally liable with Rollins and Hatler for $175,000 in mental anguish damages under § 1983, or alternatively, the City was liable under the Whistleblower Act for those damages. The City now appeals its liability under both statutes. We determine that the City is liable under the Whistleblower Act.

That Act provides:

> A state or local governmental body may not suspend or terminate the employment of, or otherwise discriminate against, a public employee who reports a violation of law to an appropriate law enforcement agency if the employee report is made in good faith.

TEX.REV.CIV.STAT.ANN. art. 6252-16a § 2 (1992).[3] To establish a whistleblower claim, an employee must demonstrate that (a) the employee reported an alleged violation of law to an appropriate law enforcement authority; (b) the employee made the report in good faith; (c) the employer took an adverse employment action against the employee because the employee made the report; and (d) the employer's action proximately caused the employee's injuries. *Wichita County v. Hart*, 892 S.W.2d 912, 920-24 (Tex.App. – Austin 1994), *reversed on other grounds*, 917 S.W.2d 779 (Tex.1996).

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[3] In September 1993, the Whistleblower Act was amended and recodified, TEX.GOVT.CODE §§ 554.001-.009 (West Supp.1996).

In the instant case, it is undisputed that Forsyth and Kirks reported alleged violations of law in good faith to an appropriate law enforcement agency. We have already determined that the making of the reports led to plaintiffs' transfers and that Forsyth and Kirks were thereby damaged. The only disputed issue is whether the Whistleblower Act prohibited the DPD from transferring Forsyth and Kirks.

The City contends that the Whistleblower Act did not prohibit the transfers; it argues that the transfers do not constitute demotions because Forsyth and Kirks suffered no decrease in pay, and that, in any case, demotions are not covered by the Act. We reject both of the City's arguments. First, the evidence established that Forsyth's and Kirks's transfers constituted demotions. Second, Texas courts have held that the phrase "or otherwise discriminate against" in the Act prohibits an employer from demoting a whistleblowing employee. *City of Brownsville v. Pena*, 716 S.W.2d 677, 680 (Tex.App. – Corpus Christi 1986); *City of Beaumont v. Bouillion*, 873 S.W.2d 425, 445 (Tex.App. – Beaumont 1993), *reversed on other grounds*, 896 S.W.2d 143 (Tex.1995). Further, we point out that the Texas legislature has since amended the Whistleblower Act to clarify that it covers transfers. TEX.GOVT.CODE §§ 554.001-.002 (West Supp.1996) (defining "adverse employment actions" to include transfers).

The City next challenges the jury's $750,000 exemplary damage award. Section 4(a)(2) of the Whistleblower

Act[4] provides that a governmental employer can be liable for exemplary damages if the employer acts intentionally, fraudulently, maliciously, or with gross negligence. TEX.REV.STAT.ANN. art. 6252-16a, § 4(a)(2); *City of Ingleside v. Kneuper*, 768 S.W.2d 451 (Tex.App. – Austin 1989), *error denied* (Oct. 25, 1989). Texas courts have construed the term "employer" to hold the governmental entity vicariously liable for the acts of its employees. *E.g., Tex. Dept. of Human Serv. v. Green*, 855 S.W.2d 136, 142-43 (Tex.App. – Austin 1993), *error denied* (Feb. 2, 1994) (Whistleblower Act waives the government's sovereign immunity and governmental agency may be vicariously liable for acts of low-level supervisors); *City of Houston v. Leach*, 819 S.W.2d 185, 200-01 (Tex.App. – Houston, 14th Dist.1991) (City of Houston held vicariously liable under the Whistleblower Act but not under 42 U.S.C. § 1983). The evidence here was sufficient to impose punitive damage liability on the City for the conduct of Rollins and Hatler. Moreover, we reject the City's argument that the amount of exemplary damages assessed – $750,000 – was excessive. That amount is less than four times the officers' actual damages.

C. Other Issues

Kirks cross-appeals, contending that the district court erred in granting judgment as a matter of law to the appellants on his claim for lost wages. But the evidence was insufficient to support the jury's award. Kirks only

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[4] Section 4(a)(2) provides that "[a] public employee who sues under this Act may recover . . . exemplary damages."

speculated during his testimony that his no-hire status with the DPD would make it difficult for him to obtain another job. He never testified that he actually lost work because of that status.

Finally, both sides dispute the amount of attorneys' fees awarded plaintiffs under § 1983 and § 4(a)(4) of the Whistleblower Act. We find no abuse of discretion. The district court reviewed the attorneys' billing records in accordance with the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), and reduced both the hourly rates and the billable hours claimed by Forsyth's and Kirks' attorneys, but the final award was hardly unreasonable.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10360

D.C. Docket No. 3:91-CV-344
3:90-CV-1118-T

JAN FORSYTH; RICHARD KIRKS

Plaintiffs-Appellees-Cross-Appellants

v.

DALLAS TX CITY OF, ET AL

Defendants

DALLAS TX CITY OF; WILLARD ROLLINS; RICHARD HATLER

Defendants-Appellants-Cross-Appellees

Appeals from the United States District Court for the Northern District of Texas, Dallas

Before POLITZ, Chief Judge, JONES and BARKSDALE, Circuit Judges.

JUDGMENT

(Corrected)
(Filed Mar. 31, 1997)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the district court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant cross-appellee pay to plaintiffs-appellees cross-appellants the costs on appeal to be taxed by the Clerk of this Court.

IT IS FURTHER ORDERED that the issue of attorneys' fees is remanded to the district court.

ISSUED AS MANDATE: MAR 31 1997

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10360

JAN FORSYTH; RICHARD KIRKS,

Plaintiffs-Appellees-Cross-Appellants,

versus

DALLAS TX CITY OF, ET AL,

Defendants,

DALLAS TX CITY OF; WILLARD ROLLINS;
RICHARD HATLER,

Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Texas, Dallas

(Corrected)
(Filed Mar. 31, 1997)

Before POLITZ, Chief Judge, JONES and BARKSDALE, Circuit Judges.

BY THE COURT:

Appellants' motions for rehearing and rehearing en banc are denied. The order of this court entered on November 15, 1996 remains in force and in effect. This order is then issued as and for the mandate.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10360

JAN FORSYTH; RICHARD KIRKS

Plaintiffs-Appellees-Cross-Appellants

v.

DALLAS TX CITY OF, ET AL

Defendants

DALLAS TX CITY OF; WILLARD ROLLINS; RICHARD HATLER

Defendants-Appellants-Cross-Appellees

Appeals from the United States District Court for the Northern District of Texas, Dallas

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(Filed Nov. 15, 1996)

Before POLITZ, Chief Judge, JONES and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the supplemental motion of Appellees to amend the August 16, 1996 judgment is GRANTED to the extent necessary to remand the issue of attorneys' fees;

IT IS FURTHER ORDERED that the alternative request of Appellees to remand the issue of attorney's fees back to the District Court for determination is GRANTED.

IT IS FURTHER ORDERED that the alternative request of Appellees that the Court independently set the award of attorneys' fees is DENIED as unnecessary.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD KIRKS,
et al.,

Plaintiffs,

v. No. 3:90-CV-1118-T

CITY OF DALLAS, TEXAS,
et al.,

Defendants.

AMENDED FINAL JUDGMENT

(Filed Mar. 31, 1995)

(entered on docket 4-3-95 pursuant to
F.R.C.P. Rules 58 and 79a)

This action came before the Court on a jury trial on January 3, 1995, Honorable Robert B. Maloney, presiding, and the issues having been duly considered and a decision having been rendered.

It is ORDERED and ADJUDGED that on Plaintiff Kirks's claims pursuant to 42 U.S.C. § 1983, judgment is entered in Kirks's favor and against Defendants Rollins, Hatler, and the City of Dallas, jointly and severally, in the amount of $75,000 for mental anguish.

It is FURTHER ORDERED and ADJUDGED that on Plaintiff Forsyth's claims pursuant to 42 U.S.C. § 1983,

judgment is entered in Forsyth's favor and against Defendants Rollins, Hatler, and the City of Dallas, jointly and severally, in the amount of $100,000 for mental anguish.

It is FURTHER ORDERED and ADJUDGED that on Plaintiffs' claims pursuant to 42 U.S.C. § 1983, judgment is entered in Plaintiffs' favor and against Defendant Rollins in the amount of $125,000 for exemplary damages.

It is FURTHER ORDERED and ADJUDGED that on Plaintiffs' claims pursuant to 42 U.S.C. § 1983, judgment is entered in Plaintiffs' favor and against Defendant Hatler in the amount of $125,000 for exemplary damages.

It is FURTHER ORDERED and ADJUDGED that on Plaintiff Kirks's claims pursuant to the Texas Whistleblower Act, judgment is entered in Kirks's favor and against Defendant City of Dallas in the amount of $75,000 for mental anguish. However, these damages may only be recovered by Plaintiff Kirks in the event that he is unable to recover these same damages for his claims brought pursuant to 42 U.S.C. § 1983.

It is FURTHER ORDERED and ADJUDGED that on Plaintiff Forsyth's claims pursuant to the Texas Whistleblower Act, judgment is entered in Forsyth's favor and against Defendant City of Dallas in the amount of $100,000 for mental anguish. However, these damages may only be recovered by Plaintiff Forsyth in the event that she is unable to recover these same damages for her claims brought pursuant to 42 U.S.C. § 1983.

It is FURTHER ORDERED and ADJUDGED that on Plaintiffs' claims pursuant to the Texas Whistleblower Act, judgment is entered in Plaintiffs' favor and against

Defendant City of Dallas in the amount of $750,000 for exemplary damages.

It is FURTHER ORDERED and ADJUDGED that Plaintiffs Kirks and Forsyth take nothing against Defendant Vines.

It is FURTHER ORDERED and ADJUDGED that judgment is entered in Plaintiffs' favor and against Defendants Rollins, Hatler, and the City of Dallas, jointly and severally, in the amount of $146,365 for reasonable attorneys' fees and in the amount of $7,105.15 for costs.

It is FURTHER ORDERED and ADJUDGED that Plaintiffs receive post-judgment interest at the rate of 7.34% per year from the date of entry of judgment until paid on the total of the above-listed amounts.

It is FURTHER ORDERED and ADJUDGED that all relief not specifically granted herein is denied.

Signed this 30th day of March 1995.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD KIRKS,
et al.,

Plaintiffs,

v. No. 3:90-CV-1118-T

CITY OF DALLAS, TEXAS,
et al.,

Defendants.

ORDER DENYING DEFENDANTS' MOTIONS FOR JUDGMENT AS A MATTER OF LAW

(Filed Jan. 25, 1995)

At the close of Plaintiffs' case-in-chief, Defendants moved for a judgment as a matter of law pursuant to FED. R. CIV. P. 50(a). Defendants' motion was denied. At the close of all of the evidence, Defendants renewed their motion. After consideration of the motion, the arguments, and the evidence presented at the trial, the Court denied the motion.

Rule 50(a) provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law

> against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

The City of Dallas first moved for judgment as a matter of law on the issue of whether the city has an officially adopted and promulgated policy of retaliation in violation of 42 U.S.C. § 1983. It argued that it cannot be held liable for civil rights violations under a theory of *respondeat superior* or vicarious liability. The city also moved for judgment as a matter of law on the issues of whether retaliation is a persistent, widespread practice of city officials or employees, that such action is so common and well-settled as to constitute a custom that fairly represents municipal policy, and that actual or constructive knowledge of such custom is attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

The Court was of the opinion that the city had not established as a matter of law that an "official policy" regarding retaliation did not exist at the time Plaintiffs were transferred from the intelligence division to the patrol division. "Official policy" is defined as:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

2. A persistent, widespread practice of city officials or employees, which, although not

> authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

Bennett v. City of Slidell, 735 F.2d 861 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985). Municipal liability attaches only where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986). When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. *Id.* If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final. *Id.*

After reviewing the evidence admitted at trial, the Court was of the opinion that Chiefs Hatler, Rollins, and Vines did not have final authority with respect to the decision to transfer Kirks or Forsyth. Pursuant to Section 2, Chapter XII of the Dallas City Charter, which was admitted into evidence, the police chief shall "have immediate direction and control of the police department,

subject to the supervision of the city manager, and also subject to such rules, regulations and orders as the city manager may prescribe, not inconsistent with the ordinances of the city, and shall promulgate all orders, rules and regulations for government of the police force." Because the police chief maintained supervisory control over his deputy chiefs and the city manager maintained supervisory control over the police chief, Chiefs Hatler, Rollins, and Vines did not have final authority. Although the individual defendants did not have final authority, a fact question remained regarding whether there was in fact an official policy of retaliation.

Defendants next moved for judgment as a matter of law on the issue of whether Plaintiffs' speech was protected. They argued that Plaintiffs did not supply the information to the reporter and thus the speech was not theirs to protect. They next argued that Plaintiffs did not speak as citizens upon matters of public concern but instead as employees upon issues of personal interest. Alternatively, Defendants argued that, if Plaintiffs did speak upon matters of public concern, Defendants' interest in promoting the efficiency of the public services performed by the intelligence division outweighed Plaintiffs' interest in commenting upon matters of public concern.

To establish a constitutional violation, plaintiffs must first prove that their speech involved a matter of public concern. *Connick v. Meyers*, 461 U.S. 138 (1983). Second, they must demonstrate that their interest in commenting upon matters of public concern is greater than defendants' interest in promoting the efficiency of the public

services they perform. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

The Court found that the newspaper articles introduced into evidence constituted the First Amendment speech expressions of Plaintiffs. The Court further found that, although the actual statements made were made by counsel for Plaintiffs, the statements were made pursuant to authority given by Plaintiffs. *See Brawner v. City of Richardson*, 855 F.2d 187 (5th Cir. 1988). The Court concluded that the speech made by Plaintiffs' authorized agent was sufficiently connected to Plaintiffs to be considered Plaintiffs' speech.

After examination of the newspaper articles, the Court found that the articles detail allegations of criminal wrongdoing by Dallas police officials and allegations of conflict of interest and malfeasance by police officials in ignoring the involvement of a politically connected attorney in an alleged illegal wiretap operation. However, the speech was made in connection with a lawsuit to be filed by Plaintiffs. Thus, the Court believed that Plaintiffs had a mixed motive in exercising their right to free speech. The Court then weighed whether Plaintiffs were speaking as employees involved in a personal employment dispute or as citizens generally speaking out on a matter of public concern. Considering the record in this case, the content of the statements, and the context and circumstances under which the statements were made, the Court concluded that Plaintiffs spoke predominately [sic] as citizens and the content addressed a matter of public concern.

The Court further found that Plaintiffs' interest in speaking on matters of public concern outweighed Defendants' interest in promoting the efficiency of the public services they perform. Specifically, Plaintiffs' interest and the public's interest in ensuring that favoritism and dereliction of duty do not occur in the police department outweighed Defendants' interest in maintaining control over their employees. Accordingly, Plaintiffs' speech was protected speech under the First Amendment as a matter of law.

Defendants next moved for judgment as a matter of law on Plaintiffs' whistleblower causes of action. They argue that Plaintiffs' transfers were not adverse employment actions. Alternatively, they argued that, if the transfers were adverse, the transfers were not done for retaliatory purposes.

After reviewing the evidence presented at trial, the Court was of the opinion that fact issues existed as to whether the transfers were adverse employment actions and whether the transfers were done for retaliatory purposes.

Last, the individual defendants moved for judgment as a matter of law that they are protected by qualified immunity.

The Court ruled that for the individual defendants to avail themselves of qualified immunity there must be shown that the individual defendants did not know and reasonably would not have known that retaliation against a person for exercising a First Amendment right was illegal. The testimony at trial does not support such a finding, since the Defendants testified that they did know

such action would be illegal and that retaliation did not enter into their decision to transfer Plaintiffs. The Court concluded that the issue of qualified immunity was not raised and that there existed an issue of material fact as to the individual defendants' real motive in transferring Plaintiffs. Accordingly, Defendants' Motions for Judgment as a Matter of Law should be denied.

It is therefore **ORDERED** that the oral Motions for Judgment as a Matter of Law made by Defendants at the close of all of the evidence on January 12, 1995, are **denied**.

Signed this 25th day of January 1995.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX G

K. LYBRAND – Recross-Examination by Aldrine
OUT OF THE PRESENCE OF THE JURY

Volume V

* * *

[p. 117] review some of the authority presented.

MR. LARSON: I'm sorry. I didn't hear you, Judge?

MR. BOYD: Come back at one.

THE COURT: Come back at one. I'm going to review some of the authorities that's been presented.

MR. GILLMEN: All rise.

(Lunch recess.)

MR. GILLMEN: All rise.

(Judge enters the courtroom.)

THE COURT: The court has used the lunch hour time to review some, but not all of the authorities presented to the court.

There is not enough authority that the court has reviewed at this time for the court to be able to grant a motion for judgment. So at this time, the motion for judgment are denied both as to all defendants.

Of course, each and all of the defendants may renew their motion at the close of all the evidence, and the court will consider all of the arguments that have been previously made for judgment at that time.

Okay. Is the defendant prepared to proceed?

MR. HOPKINS: Yes, Your Honor.

MR. BOYD: May we confer briefly, Your Honor, in view of the court's ruling?

THE COURT: You may.

* * *

APPENDIX H

CHARGE CONFERENCE
OUT OF THE PRESENCE OF THE JURY

Volume VI

[p. 62] THE COURT: Then I think that I will leave that decision to you.

All right. The court will be in recess.

THE CLERK: All rise.

(Court was in recess.)

CHARGE CONFERENCE

THE CLERK: All rise.

(Judge enters the courtroom.)

THE CLERK: Be seated, please.

THE COURT: All right. As usual, things seem to take about three times as long as I originally estimate they're going to take, so the charge that I have – the draft of the charge that I have put in your hands is very much a rough draft.

There are certain areas that some of the liability and damage questions I haven't made a decision of how to break those out as to individual defendants, things of that nature that is more mechanical than they are substantive, but there is still lot of decisions to be made on the charge, so don't anyone get alarmed or self-satisfied if the charge looks the way you like it, because it may look entirely different tomorrow.

Before I start on the charge, I will be issuing a more complete order on the defendant's Rule 50 motions, but

to dispose of certain matters that the court feels it should [p. 63] rule on as a matter of law, I will give you somewhat a shorthand – as a matter fact, the longhand ruling on those matters.

As to the question of the plaintiffs' free speech First Amendment questions, the court finds that the newspaper articles introduced in evidence constitute the First Amendment speech expression of the plaintiffs.

The court finds that although the actions, statements were made by counsel for plaintiffs, the statements – that the statements were made pursuant to authority given to counsel by the plaintiffs.

The court concludes that the speech made by an authorized agent of the plaintiffs is sufficient to be connected to plaintiffs, to be considered plaintiffs' speech.

The court, after examination of the articles, finds that the articles detail allegations of criminal wrongdoing by Dallas police officials and allegations of conflict of interest and malfeasance by police officials in the authority involvement of the politically connected attorney in an illegal wiretap operation.

Consequently, the court concludes that the plaintiffs' speech addressed a matter of public concern as the speech as made in connection with the lawsuit to be filed by the plaintiffs, the court believes that the plaintiffs having [p. 64] mixed motives in exercising their right to free speech.

However, the court has weighed whether the plaintiffs were speaking as employees involved in a personal

employment dispute or as citizens genuinely speaking out on a matter of public concern.

Considering the record in this case, the content of the statements, and the context of the circumstances under which the statements were made, the court finds that at the time the statements were made the content of the statements in considering the content of the statement, the plaintiffs had little to gain personally from the statements and that the evidence produced in this trial is sufficient to reasonably justify the plaintiffs' belief that a coverup was in progress.

The court finds that the plaintiffs' interest and the public's interest in ensuring that favoritism and questionable criminal investigation do not occur in the police department outweighs the defendants' interest in maintaining strict control over the statements made by its employees.

Therefore, the court concludes that the plaintiffs spoke primarily as citizens in the content address in a matter of public concern and, therefore, was protected speech under the First Amendment as a matter of law.

The court finds that includes that municipal liability [p. 65] attaches only where the decision-makers possess final authority to establish municipal policy with respect to the action ordered and the official's discretionary decision are constrained by the policy is not of that official's making. Those policies, rather than the subordinate's departure from them the act of municipality.

Similarly, when a subordinate's decision is subject to review by the municipality's authorized policy makers,

they have retained hereby to measure the official's conduct or performance with their policies.

After reviewing the evidence admitted in trial, the court is of the opinion that Chief Vines did not have the final authority with respect to the decision to transfer Kirks or Forsyth.

Pursuant to Section 2, Chapter 12 of the Dallas City Charter, which is submitted into evidence, the Chief of Police shall have immediate direction and control over the police department subject to supervision of the City Manager and also subject to such rules and regulations and orders that the City Manager may prescribe, not inconsistent with the ordinance of the city and shall promulgate all orders, rules and regulations for the government of the police force.

Because the City Manager maintains supervisory control over the Police Chief, Chief Vines did not have final [p. 66] authority.

Therefore, the court finds that the actions of Chief Vines were not sufficient to establish as a matter of law that the – an official policy of the City of Dallas.

It does not mean that it cannot be established by other means, but simply not simply because he made the decision in the case.

As to qualified immunity for the individual defendants to avail themselves for qualified immunity, there it must be shown that the individual defendant did not know and reasonably would not have known that retaliation against the person for exercising their First Amendment right was illegal.

Testimony at trial does not support such a finding since the defendants testified they did not know – that they did know such action would be illegal and that retaliation did not enter into their decision to transfer the plaintiffs.

Therefore, the court concludes that qualified immunity is not an [sic] raised issue, is a material fact issue as to the individual defendant's real motive in transferring plaintiffs.

Therefore, in summary, the court finds that the plaintiffs' speech was a matter of public concern and it was protected speech, that Mack Vines, police chief at the time [p. 67] in question, was not a final decision maker or policy maker as regards to these plaintiffs. His actions do not establish an official policy of the City of Dallas, and that the individual defendants are not entitled to qualified immunity.

Now, I'll take up the charge.

Mr. Larson, I'll let you go first.

MR. LARSON: Yes, sir.

I assume in light of what you just read, some of the charge is going to be changed in regards to reflect that.

THE COURT: That's correct.

MR. LARSON: Okay. All right.

THE COURT: Let me kind of give you an idea of how I go about these things. And I didn't have time to complete it.

Since the plaintiff has the burden of proof, I generally start out with the plaintiffs' charge and try to give the plaintiff, in the draft copy, as much charge as I can in good conscious [sic] allow the plaintiff to have. That does not mean that I have rejected the defendants' requested charge.

So I just want you to know procedures there and so the charge will look, at this point, as if it is your charge –

MR. LARSON: Yes, sir.

THE COURT: – but it may not end up that way.

APPENDIX I

OBJECTIONS TO THE CHARGE OUT OF THE PRESENCE OF THE JURY

Volume III

* * *

[p. 5] THE COURT: Thank you.

MR. ALDRINE: Yes, Your Honor. First of all, on charge – page 6, with the intent, the defendants object to the instructions that are given and seek to include any instructions [sic] on intent that's found in Longoria V. Wilson, it's 730 F 2d 300, and Young V. City of New Orleans, F 2d 59 – F 2d 794.

We feel that the instruction included does not complete – fails to adequately inform the jury of the applicable laws at issue in the instruction as is and as is in all probability will cause a condition of improper verdict against the defendants.

THE COURT: Overruled.

MR. ALDRINE: On turning to page 9, lines 3 and 5, may be awarded exemplary damages, we seek to have that excluded or at least qualified. It seems to be too conclusory and misleading and the failure of the court to include a requested instruction does not adequately inform the jury of applicable law, and the failure to include a more clear instruction in all probably [sic] will result in an improper verdict against the defendants.

THE COURT: Overruled.

MR. ALDRINE: Turning to page 14, last full paragraph, defendants object to its inclusion and seek to replace it with defendants' proposed instructions found

on [p. 6] defendants' proposed charge, pages 18 through 20.

We feel that the failure of the court to include this requested instruction does not adequately inform the jury of applicable law, and the failure to include the instruction in all probability will result in an improper verdict against the defendants.

THE COURT: Overruled.

MR. ALDRINE: Turning to, I guess you would say, page 17, Your Honor. We believe an additional question should precede question 3 regarding whether the plaintiffs actually reported alleged illegal conduct to the press.

We feel that the failure of the court to include a requested instruction on this issue does not adequately provide the jury with the opportunity to apply the law, and the failure to include the question in all probability will result in an improper verdict against the plaintiffs.

THE COURT: Overruled.

MR. ALDRINE: Turning to page 18, line 7, permitting retaliation, defendants seek to change that to – that phrase to retaliating. We feel that the question as is is misleading to the jury.

THE COURT: Overruled.

MR. ALDRINE: Turning to page 19, Your Honor, lines 33 through 37, we feel the instruction as is is conclusory and comments on the weight of the evidence. We [p. 7] feel that the instruction is not complete and fails to adequately inform the jury with the applicable laws.

The issue and any instruction as is, in all probability, will cause an improper verdict against the defendants.

THE COURT: Overruled.

MR. ALDRINE: At this time, Your Honor, we also object to the failure to include an instruction and question regarding qualified immunity as to the defendants as contained in defendants' charge page 15 and 17.

THE COURT: Requested charge is denied.

MR. ALDRINE: Turning to page 26, Your Honor, we object to the inclusion of question C and D as there is insufficient evidence to warrant submission of the issue to the jury.

THE COURT: Overruled.

MR. ALDRINE: And, furthermore, Your Honor, we also – if C and D are to be included, we seek an instruction with regard to earnings in the future and in the past as the court has failed to include such an instruction.

I think there was one included yesterday, Your Honor.

THE COURT: I'm not following you.

MR. ALDRINE: I think that in yesterday's charge there was an instruction –

THE COURT: I hadn't changed that from yesterday. [p. 8] You are on page 26, are you not?

MR. ALDRINE: Yes, Your Honor.

THE COURT: Okay.

MR. ALDRINE: I'm just looking back at yesterday's charge on the double recovery and compensatory damages section.

THE COURT: Yes. But I thought you were talking about there was something that I had on page 26.

MR. ALDRINE: Well, you started the question, Your Honor, but preceding that, if you were going to include the question on page 26 regarding past and future earning capacities, there is no longer an instruction on that.

And yesterday's charge there was an instruction that said if plaintiffs prove that the injury they suffered extended into the future because it will be denied future economic opportunities because of the defendants' illegal actions and then the damages you may award – you award may compensate them for that loss in compensating in your calculation. However, you must include a reduction of future damages as a loss of income the present value in order to take into account – into account the earning power of the money awarded.

I don't find that in the charge today.

THE COURT: I did take that out. I may put that back in.

[p. 9] For purposes of your record, I'm going to deny it. I may put it in so that you will have a record on my ruling as it turns out. If I don't put it back in, I'll deny it at this time.

MR. ALDRINE: Turning to page 28 and 29, Your Honor, we further stress that any issue and instruction to the jury regarding punitive damages is unwarranted. There is simply insufficient evidence to warrant submission of this issue to the jury.

THE COURT: Overruled.

MR. ALDRINE: Okay. Your Honor, with respect to questions 9, 10, 11 we feel that the question should not be included because of the fact that the first question on punitive damages asks the jury do you want to punish the defendants. But even if they would say no, it seems as if the next question would say are you sure you don't want to punish the defendants for punitive damages, whereas the next question would also say are you really sure.

THE COURT: What do you mean?

MR. ALDRINE: I mean, it doesn't –

THE COURT: I'm not following.

MR. ALDRINE: – three shots at the apple –

THE COURT: They are a [sic] different defendants.

MR. ALDRINE: Well, that would bring up another objection, Your Honor. We feel if they're to be included [p. 10] that the City of Dallas should be included back on page 9 at the bottom of the fact on page 29, Your Honor, at the bottom of Vines, Rollins and Hatler. It seems that that's a comment on the weight of the evidence. Since we have a separate – if we separate

the City of Dallas from the individual defendants on a separate question.

THE COURT: But it is a separate question. So your objection is overruled on that.

MR. ALDRINE: Nothing else, Your Honor.

THE COURT: Mr. Boyd.

MR. BOYD: We renew our motion for judgment on the law. We – that we made previously and we suggest that now that the evidence has closed on both sides that there is no evidence on the alternative. There is insufficient evidence to support the submission of any issues or any jury verdict on those issues against Mack Vines.

THE COURT: Overruled.

MR. BOYD: All right. We would adopt the other objections made by the Assistant City Attorney in this case without repeating them.

THE COURT: Accepted.

MR. BOYD: I assume the ruling will be the same.

THE COURT: Accepted.

THE COURT: All right. Is there anything further before I take up argument?

* * *

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10360

JAN FORSYTH; RICHARD KIRKS

Plaintiffs-Appellees-Cross-Appellants

v.

DALLAS TX CITY OF, ET AL

Defendants

DALLAS TX CITY OF; WILLARD ROLLINS;
RICHARD HATLER

Defendants-Appellants-Cross-Appellees

Appeals from the United States District Court for the
Northern District of Texas, Dallas

(Filed Apr. 21, 1997)

ORDER:

(X) The motion of appellant to recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of appellant to recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay is in force until the final disposition of the

case by the Supreme Court, provided that the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed is also filed with this court within the time stated above. The clerk shall issue a mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of this stay unless the certificate is filed with the clerk of this court within that time.

/s/ Edith H. Jones
UNITED STATES CIRCUIT JUDGE

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10360

D.C. Docket No. 3:91-CV-344
3:90-CV-1118-T

JAN FORSYTH; RICHARD KIRKS

Plaintiffs-Appellees-Cross-Appellants

v.

DALLAS TX CITY OF, ET AL

Defendants

DALLAS TX CITY OF; WILLARD ROLLINS; RICHARD HATLER

Defendants-Appellants-Cross-Appellees

Appeals from the United States District Court for the Northern District of Texas, Dallas

Before POLITZ, Chief Judge, BARKSDALE, and JONES, Circuit Judges.

JUDGMENT

(Filed Aug. 16, 1996)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the district court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant cross-appellee pay to plaintiffs-appellees cross-appellants the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: MAR 06 1997

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10360

D.C. Docket No. 3:91-CV-344
3:90-CV-1118-T

JAN FORSYTH; RICHARD KIRKS

Plaintiffs-Appellees-Cross-Appellants

v.

DALLAS TX CITY OF, ET AL

Defendants

DALLAS TX CITY OF; WILLARD ROLLINS; RICHARD HATLER

Defendants-Appellants-Cross-Appellees

Appeals from the United States District Court for the Northern District of Texas, Dallas

Before POLITZ, Chief Judge, BARKSDALE, and JONES, Circuit Judges.

JUDGMENT

(Filed Aug. 16, 1996)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the district court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant cross-appellee pay to plaintiffs-appellees cross-appellants the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: MAR 06 1997

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10360

JAN FORSYTH; RICHARD KIRKS

Plaintiffs-Appellees-Cross-Appellants

v.

DALLAS TX CITY OF, ET AL

Defendants

DALLAS TX CITY OF; WILLARD ROLLINS; RICHARD HATLER

Defendants-Appellants-Cross-Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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(Filed Mar. 1, 1996)

ORDER:

IT IS ORDERED that appellees cross-appellants' motion to strike certain portions of reply brief of appellants cross-appellees is denied.

/s/ Jacques L. Wiener, Jr.
Jacques L. Wiener, Jr.
UNITED STATES CIRCUIT JUDGE

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD KIRKS,
et al.,

Plaintiffs,

v.

No. 3:90-CV-1118-T

CITY OF DALLAS, TEXAS,
et al.,

Defendants.

ORDER DECLARING MOOT RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND DENYING IN PART AMENDED RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND DENYING IN PART ALTERNATIVE MOTION FOR NEW TRIAL

(Filed Mar. 31, 1995)

(Entered on docket 4-3-95 pursuant to F.R.C.P. Rules 58 and 79a)

Before the Court are Defendants' Renewed Motion for Judgment as a Matter of Law, Amended Renewed Motion for Judgment as a Matter of Law, and Motion for New Trial in the Alternative to their Renewed Motion for Judgment as a Matter of Law. The motions are opposed. After consideration of the motions, responses, and replies, the Court is of the opinion that the Renewed Motion for Judgment as a Matter of Law should be declared moot because the amended motion supersedes

it. The Court is further of the opinion that Defendants' Amended Renewed Motion for Judgment as a Matter of Law and Alternative Motion for New Trial should be denied in part.

Defendants move the Court to set aside the verdict and judgment in this case, vacate the Court's January 27, 1995, Order Denying Defendants' Motions for Judgment as a Matter of Law, and dismiss this case against them pursuant to FED. R. CIV. P. 50(b). Alternatively, they move the Court for a new trial pursuant to FED. R. CIV. P. 59.

In their Amended Renewed Motion for Judgment as a Matter of Law, Defendants essentially reargue the same points addressed in their earlier Motions for Judgment as a Matter of Law with a few exceptions. They argue that (1) Plaintiffs' transfers were not adverse employment actions; (2) Plaintiffs failed to establish that they made the expressive conduct at issue; (3) Plaintiffs failed to overcome the public concern threshold as they were speaking out primarily as employees embroiled in a personal employment dispute; (4) Defendants' interest in promoting the efficiency of the public services performed by the intelligence division outweighs Plaintiffs' interest, if any, in commenting upon matters of public concern; (5) Defendants Rollins and Hatler were entitled to the defense of qualified immunity; (6) there is no evidence that the City of Dallas has an officially adopted and promulgated policy of retaliation in violation of 42 U.S.C. § 1983; (7) there is no evidence that Plaintiffs were discriminated against under the Texas Whistleblower Act; (8) a finding of no liability as to Defendant Vines must lead to a finding of no liability as to the other defendants; (9) there is no evidence to support an award of punitive

damages against Defendants Rollins and Hatler under 42 U.S.C. § 1983; (10) punitive damages are not recoverable against a municipality under 42 U.S.C. § 1983; and (11) there is no evidence to support an award of punitive damages against the City of Dallas under the Texas Whistleblower Act.

The Court declines to address those arguments that have been previously briefed by the parties and ruled upon by the Court. To do so would be a waste of scarce judicial resources. Accordingly, the Court reaffirms its rulings in its January 27, 1995, Order Denying Defendants' Motions for Judgment as a Matter of Law with respect to Defendants' arguments that: (1) Plaintiffs' transfers were not adverse employment actions; (2) Plaintiffs failed to establish that they made the expressive conduct at issue; (3) Plaintiffs failed to overcome the public concern threshold as they were speaking out primarily as employees embroiled in a personal employment dispute; (4) Defendants' interest in promoting the efficiency of the public services performed by the intelligence division outweighs Plaintiffs' interest, if any, in commenting upon matters of public concern; (5) Defendants Rollins and Hatler were entitled to the defense of qualified immunity; and (6) there is no evidence that the City of Dallas has an officially adopted and promulgated policy of retaliation in violation of 42 U.S.C. § 1983. Moreover, the Court finds that sufficient evidence existed to support the jury's findings with regard to the above issues.

With regard to the remaining issues the Court finds that there was sufficient evidence to support a finding that Plaintiffs were discriminated against under the Texas

Whistleblower Act. Additionally, sufficient evidence existed to support an award of punitive damages against Defendants Rollins and Hatler for violating 42 U.S.C. § 1983 and against the City of Dallas for violating the Texas Whistleblower Act. The Court disagrees that a finding of no liability as to Defendant Vines would lead to a finding of no liability against Defendants Rollins and Hatler. Last, Plaintiffs concede and the Court agrees that punitive damages are not recoverable against a municipality under 42 U.S.C. § 1983. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

Accordingly, Defendants' Amended Renewed Motion for Judgment as a Matter of Law should be denied except that punitive damages are not recoverable against the City of Dallas under 42 U.S.C. § 1983.

In Defendants' Alternative Motion, they move for a new trial, an amended final judgment, or a remittitur. They repeat their arguments presented in their Amended Renewed Motion for Judgment as Matter of Law with a few exceptions. For the sake of judicial economy, the Court will not revisit Defendants' repeated arguments and will only address their newly presented issues.

Defendants first argue that the Court erred in submitting the following issues to the jury because there was insufficient evidence: (1) whether the city has an officially adopted and promulgated policy of retaliation in violation of 42 U.S.C. § 1983; (2) whether punitive damages should be awarded under 42 U.S.C. § 1983 and the Texas Whistleblower Act; and (3) what amount of damages would compensate Plaintiffs Kirks and Forsyth for their past and future mental anguish.

The Court finds that there was sufficient evidence to submit the above issues to the jury.

Defendants next argue that the Court erred in failing to submit issues to the jury regarding whether Plaintiffs reported any alleged illegal conduct to the press and regarding the issue of qualified immunity as to Defendants Rollins and Hatler.

The Court is of the opinion that it did not error [sic] in omitting the above issues to the jury.

Defendants next argue that the Court erred by submitting an issue to the jury regarding the amount of damages that would compensate Kirks for his loss of past earnings and loss of future earning capacity. They contend that the great weight of the evidence established no basis for an award of loss of past earnings or loss of future earning capacity. They also argue that his testimony regarding his no-rehire status was irrelevant and should have been excluded.

The Court finds that there was insufficient evidence to support an award of damages for Kirks's loss of past earnings and loss of future earning capacity. Kirks speculated that because of his no-rehire status it would be difficult for him to obtain employment. However, he never testified that he actually lost work because of that status. Accordingly, the Final Judgment will be amended to delete the award for Kirks's loss of past earnings and loss of future earning capacity.

Defendants next argue that the jury's answers on punitive damages were inconsistent. They contend that Plaintiffs claimed the same damages on the same facts

under their § 1983 claims and their Texas Whistleblower claims yet the jury awarded them $125,000 in punitive damages for the § 1983 violations and $750,000 in punitive damages for the Texas Whistleblower Act violations.

The jury actually awarded Plaintiffs $375,000 in punitive damages for their claims brought pursuant to 42 U.S.C. § 1983. It awarded Plaintiffs $125,000 in punitive damages from each of Defendants Rollins, Hatler, and the City of Dallas. The Court is of the opinion that the jury's answers on punitive damages were not inconsistent in that the damages were awarded for different conduct. One award was related to violations of Plaintiffs' First Amendment rights while the other was related to violations of the Texas Whistleblower Act.

Defendants next argue that the great weight of the evidence established that the verdict regarding mental anguish and punitive damages is unreasonable and excessive.

The Court disagrees and finds that sufficient evidence was presented to the jury with regard to mental anguish and punitive damages.

Alternatively, Defendants argue that they are entitled to a remittitur of the damages awarded. They suggest that a 90% reduction would be appropriate.

The Court is of the opinion that sufficient evidence supports the damages awarded by the jury with the exception of the damages awarded to Kirks for loss of past earnings and loss of future earning capacity. Accordingly, it declines to remit the damages.

Accordingly, Defendants' Alternative Motion for New Trial should be denied except that there is insufficient evidence to support Kirks's award for loss of past earnings and future loss of earning capacity.

In conclusion, Defendants' Renewed Motion for Judgment as a Matter of Law is declared moot and Defendants' Amended Renewed Motion for Judgment as a Matter of Law and Alternative Motion for New Trial are denied in part. The final judgment will be amended to delete the punitive damage award against the City of Dallas under 42 U.S.C. § 1983 and to delete Kirks's award for his loss of past earnings and loss of earning capacity.

It is therefore ORDERED that the Renewed Motion for Judgment as a Matter of Law filed by Defendants on February 13, 1995, is declared **moot**.

It is FURTHER ORDERED that the Amended Renewed Motion for Judgment as a Matter of Law filed by Defendants on February 14, 1995, is **denied in part**.

It is FURTHER ORDERED that the Motion for New Trial in the Alternative to their Renewed Motion for Judgment as a Matter of Law filed by Defendants on February 14, 1995, is **denied in part**.

Signed this 30th day of March 1995.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD KIRKS,
et al.,

Plaintiffs,

v. No. 3:90-CV-1118-T

CITY OF DALLAS, TEXAS,
et al.,

Defendants.

ORDER GRANTING IN PART PLAINTIFFS' MOTION TO AMEND JUDGMENT AND GRANTING IN PART PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

(Filed Mar. 31, 1995)

Before the Court are Plaintiffs' Motion to Amend Judgment and Motion for Attorneys' Fees and Costs. The motions are opposed. After consideration of the motions, responses, and replies, the Court is of the opinion that the motions should be granted in part.

Plaintiffs move the Court to amend the final judgment in this case to include an award for prejudgment interest on their compensatory damages under 42 U.S.C. § 1983 and under the Texas Whistleblower's Statute. They next request that the post-judgment interest rate be changed from the federal rate to the state rate. They last

request that they be awarded reasonable attorneys' fees and costs.

Defendants respond that federal and state law preclude an award of prejudgment interest. They further respond that federal law dictates the amount of post-judgment interest to be awarded in this case. They last respond that plaintiffs' request for attorneys' fees and costs is excessive and should be reduced.

The Court is of the opinion that Plaintiffs are not entitled to prejudgment interest in this case and the federal post-judgment rate of interest is the correct interest rate. The Court is further of the opinion that Plaintiffs are entitled to an award of attorneys' fees and costs incurred as a result of this action and have satisfied the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

Plaintiffs contend they have incurred legal fees in the amount of $146,365. Plaintiffs' counsel, Douglas Larson and Russell Daniels, submitted affidavits regarding expenses and attorneys' fees. They attest that a total of 692.60 hours were spent on this case and specified the amount of time spent by each attorney. They further divided their time on the number of hours spent in and out of the courtroom and time spent by Daniels as a law clerk and as an attorney. Larson and Daniels further attest that the hourly billing rates for attorneys involved in this matter range from $75 to $300. They contend that the case was novel, interesting, and complex. Because of this, they believe the requisite skill to properly perform the legal services in this case was high. They further state that they were precluded from other employment due to

their work in this action and that there were several undesirable aspects of this litigation. They last contend that a contingency enhancement should be made in this case in the amount of $560,266.66.

Edward Cloutman III, an attorney in Dallas, submitted an affidavit as to the customary range of billing rates in the Dallas area. He asserts that the range of billing rates sought in this matter is reasonable and customary in the Dallas area.

Defendants contend that the prevailing hourly market rate in the Dallas legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation to that of Larson and Daniels is $225 and $125 respectively. Defendants further contend that Plaintiffs are not entitled to an enhancement. They also argue that the attorneys' fees should be reduced because Plaintiffs did not amend their state court petition to add a § 1983 claim, entitling Plaintiffs to an award of attorneys' fees, until a year after their state court petition was filed. They maintain that, in that first year of litigation, $37,732.50 in attorneys' fees were incurred.

After examination of the time records provided by Plaintiffs, the Court is of the opinion that 692.60 hours is a reasonable amount of time spent in this case. The Court is further of the opinion that due to the nature of this case the hourly rates of $250 for Larson, $125 for Daniels as an attorney, and $75 for Daniels as a law clerk are reasonable. The time records reflect that Larson spent 540.20 hours on the case while Daniels spent 10.35 hours as a law clerk and 142.05 hours as an attorney. The Court sees no reason to award higher attorneys' fees for courtroom

activities or to enhance the attorneys' fees award due to Plaintiffs' contingency agreement with their attorneys. Additionally, Plaintiffs' award should not be reduced by $37,732.50, because Plaintiffs are entitled to attorneys' fees under their state law claims as well as their federal claims. *See* TEX. REV. CIV. STAT. ANN. art. 6252-16a. Based on the hours spent in this case and the respective hourly billing rates Plaintiffs are entitled to an award of attorneys' fees in the amount of $153,582.50. However, Plaintiffs' counsel only billed for $146,365 for attorneys' fees. The Court will not award an amount higher than that requested. Accordingly, Defendants Rollins, Hatler, and the City of Dallas are jointly and severally liable for Plaintiffs' attorneys' fees in the amount of $146,365.

Plaintiffs are also entitled to recover their expenses incurred in this action. They seek $7,105.15. Defendants argue that Plaintiffs should not be entitled to expenses related to the depositions of individuals relevant only to Plaintiffs' wiretap litigation. Plaintiffs respond that the parties entered into an agreement that discovery in both the wiretap and whistleblower lawsuits would apply to both lawsuits.

After examination of the request for expenses, the Court is of the opinion that $7,105.15 is a reasonable amount in light of the parties' discovery agreement. Therefore, Defendants Rollins, Hatler, and the City of Dallas are jointly and severally liable for Plaintiffs' expenses related to this action in the amount of $7,105.15.

It is therefore **ORDERED** that the Motion to Amend Judgment filed by Plaintiffs on February 10, 1995, is **granted in part.**

It is **FURTHER ORDERED** that the Motion for Attorneys' Fees and Costs filed by Plaintiffs on February 14, 1995, is **granted in part,** the Final Judgment will be amended accordingly.

Signed this 30th day of March 1995.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD KIRKS,
et al.,

Plaintiffs,

v. No. 3:90-CV-1118-T

CITY OF DALLAS, TEXAS,
et al.,

Defendants.

FINAL JUDGMENT

(Filed Jan. 31, 1995)

This action came before the Court on a jury trial on January 3, 1995, Honorable Robert B. Maloney, presiding, and the issues having been duly considered and a decision having been rendered.

It is **ORDERED** and **ADJUDGED** that on Plaintiff Kirks's claims pursuant to 42 U.S.C. § 1983, judgment is entered in Kirks's favor and against Defendants Rollins, Hatler, and the City of Dallas, jointly and severally, in the amount of $75,000 for mental anguish, $80,000 for loss of past earnings, and $675,000 for loss of earning capacity in the future.

It is **FURTHER ORDERED** and **ADJUDGED** that on Plaintiff Forsyth's claims pursuant to 42 U.S.C. § 1983,

judgment is entered in Forsyth's favor and against Defendants Rollins, Hatler, and the City of Dallas, jointly and severally, in the amount of $100,000 for mental anguish.

It is **FURTHER ORDERED** and **ADJUDGED** that on Plaintiffs' claims pursuant to 42 U.S.C. § 1983, judgment is entered in Plaintiffs' favor and against Defendant Rollins in the amount of $125,000 for exemplary damages.

It is **FURTHER ORDERED** and **ADJUDGED** that on Plaintiffs' claims pursuant to 42 U.S.C. § 1983, judgment is entered in Plaintiffs' favor and against Defendant Hatler in the amount of $125,000 for exemplary damages.

It is **FURTHER ORDERED** and **ADJUDGED** that on Plaintiffs' claims pursuant to 42 U.S.C. § 1983, judgment is entered in Plaintiffs' favor and against Defendant City of Dallas in the amount of $125,000 for exemplary damages.

It is **FURTHER ORDERED** and **ADJUDGED** that on Plaintiff Kirks's claims pursuant to the Texas Whistleblower Act, judgment is entered in Kirks's favor and against Defendant City of Dallas in the amount of $75,000 for mental anguish, $80,000 for loss of past earnings, and $675,000 for loss of earning capacity in the future. However, these damages may only be recovered by Plaintiff Kirks in the event that he is unable to recover these same damages for his claims brought pursuant to 42 U.S.C. § 1983.

It is **FURTHER ORDERED** and **ADJUDGED** that on Plaintiff Forsyth's claims pursuant to the Texas Whistleblower Act, judgment is entered in Forsyth's favor and against Defendant City of Dallas in the amount of

$100,000 for mental anguish. However, these damages may only be recovered by Plaintiff Forsyth in the event that she is unable to recover these same damages for her claims brought pursuant to 42 U.S.C. § 1983.

It is **FURTHER ORDERED** and **ADJUDGED** that on Plaintiffs' claims pursuant to the Texas Whistleblower Act, judgment is entered in Plaintiffs' favor and against Defendant City of Dallas in the amount of $750,000 for exemplary damages.

It is **FURTHER ORDERED and ADJUDGED** that Plaintiffs Kirks and Forsyth take nothing against Defendant Vines.

It is **FURTHER ORDERED** and **ADJUDGED** that Plaintiffs receive post-judgment interest at the rate of 7.34% per year from the date of entry of judgment until paid on the total of the above-listed amounts.

It is **FURTHER ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

Signed this 31st day of January 1995.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX Q

19 F.3d 1527 (5th Cir. 1994)

Jan FORSYTH, et al., Plaintiffs-Appellants,

v.

John Holman BARR, et al., Defendants,

Mack VINES, Dwight Walker, Willard Rollins, Defendants-Appellees,

v.

CITY OF DALLAS, TEXAS, Defendant-Appellee-Appellant.

No. 93-1052.

United States Court of Appeals, Fifth Circuit.

April 20, 1994.

Undercover police officers and informants brought action under Federal Wiretap Act against city and three of its police officers. The United States District Court for the Northern District of Texas, Robert B. Maloney, J., entered summary judgment for city and officers, and undercover officers and informants appealed. The Court of Appeals, Barksdale, Circuit Judge, held that: (1) undercover officers and informants did not establish that city and officers intentionally intercepted their telephone conversations; (2) city's and police officers' use and disclosure of information from illegally intercepted telephone communications in conducting preliminary internal affairs investigation of undercover officers, was authorized by Federal Wiretap Act; and (3) district court could disqualify city attorney from representing defendant police officer.

Affirmed.

Douglas R. Larson, Mesquite, TX, for Forsyth & Kirks.

Edward B. Cloutman, III, Dallas, TX, for Bruton & Bruton.

Bill Boyd, Boyd, Veigel & Hance, McKinney, TX, for Vines.

Fritz J. Aldrine, II, Asst. City Atty., Katherine Knight, Kathleen Finck, Craig Hopkins, Dallas, TX, for Walker, Rollins and City of Dallas.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

BARKSDALE, Circuit Judge:

At issue is a summary judgment awarded the appellees (City of Dallas and three of its police officers) on the appellants' claims under the Federal Wiretap Act, 18 U.S.C. §§ 2510-2521: (1) for interception by a third person (appellants claim conspiracy) of the appellants' telephone conversations, when two of the appellants were police officers involved in an undercover operation; and (2) for the appellees' disclosure and use of the contents of those intercepted conversations for a police internal affairs investigation, conducted after that information was conveyed to the police as part of the bases for charges against one of the appellants (an officer).

The appellees deny that they were involved in the interception of the communications, but they did disclose

and use the information in their investigation. In the final analysis, the summary judgment hinges on whether the disclosure and use were permitted by the Act, it being undisputed that they were "appropriate to the proper performance of the [appellee officers'] official duties", as provided for in § 2517(1) and (2). The linchpin to that question, assuming that the third person illegally intercepted the information, is whether the appellee officers' "obtain[ing]" that information from that person was "by any means authorized by" the Act, as found in § 2517(1) and (2). The meaning of this phrase is far from clear; but the legislative history sanctioning such disclosure and use of illegally intercepted information is crystal clear.

The persons whose conversations were intercepted – Jan Forsyth and Richard Kirks (the officers), and Susan and Charles Bruton (the latter being an informant) – appeal from the judgment for the City, Dwight Walker, Willard Rollins, and Mack Vines. The City appeals being required to provide independent counsel for Vines. We **AFFIRM**.

I.

Dallas police officers Forsyth and Kirks, two of the four appellants, were assigned to the Intelligence Division. In December 1987, under the supervision of appellee Rollins of that division, they began an undercover investigation, with appellant Charles Bruton acting as an informant. His wife, appellant Susan Bruton, had been an informant previously for Forsyth. The investigation was conducted, in part, from the Brutons' home in Dallas, including over their telephone.

While the undercover investigation was ongoing, appellant Forsyth was telephoned in March 1988 by John Barr, a Dallas attorney,[1] about an unrelated civil case involving appellant Charles Bruton (the informant) and Barr's client, George Grogan.[2] The appellants alleged in their complaint that Grogan had hired Bruton to illegally dispose of toxic chemicals; that he had reported the illegal disposal, causing state environmental authorities to initiate an investigation of Grogan; that Barr sought Forsyth's assistance in having Bruton recant his illegal disposal charges; and that Forsyth refused to become involved.

The appellants further alleged in their complaint that, in June 1988, Barr and Grogan contacted the Dulworths, neighbors of both Grogan and the Brutons,[3] and asked for their assistance either in discrediting Charles Bruton, Forsyth, and Kirks, or in finding a way to force Bruton to recant his waste disposal charges; that the Dulworths held a grudge against Bruton because he had testified in a criminal trial against Gary Dulworth; that the Dulworths arranged to route the Brutons' telephone line into a previously dormant line at the Dulworths'

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[1] Barr, who described himself as a "cop groupie", occasionally accompanied Dallas police officers in the execution of warrants.

[2] Grogan, a businessman and former member of the Dallas Planning and Zoning Commission, owned property next to the Brutons' home.

[3] Homer and Joyce Dulworth, and their son, Gary, resided across the street from the Brutons.

home, so that, on an extension in their home, the Dulworths could listen to the Brutons' telephone conversations; and that Barr, Grogan, and the Dulworths monitored and recorded the Brutons' calls, in violation of the Wiretap Act.

On September 22, 1988, Grogan, Barr, and one of Barr's law partners met with appellee Walker, who was in charge of the police Internal Affairs Division, and charged that Forsyth had engaged in criminal and administrative misconduct during the undercover investigation.[4] Walker was told that, over one of her telephones, Mrs. Dulworth had overheard conversations between Charles Bruton and Forsyth; that Mrs. Dulworth thought that the telephone had been disconnected, but that it had suddenly become operable; and that she had told Grogan that she believed that her telephone line had become crossed with the Brutons'. Barr told Walker that a wiretap was not involved, and Walker believed that the telephone had become a party line accidentally.

At the meeting, Barr made very serious charges against Forsyth and the Brutons.[5] At the conclusion of the

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[4] The appellants alleged that Barr used the illegally intercepted conversations to punish Forsyth and Kirks for not cooperating with him regarding Charles Bruton and Grogan's toxic waste disposal.

[5] On September 22, Barr submitted an affidavit summarizing his charges against Forsyth. Also at the meeting that same day, Barr told Walker that he and Grogan believed that Forsyth was making arrangements for the dismissal of environmental fines of approximately $30,000 against Charles Bruton; that Bruton and Forsyth were involved in a personal relationship and possibly had taken a trip to Tennessee

meeting, Walker was not certain which charges arose out of the telephone eavesdropping and which came from other sources. At least some of the information was obtained by Barr, his law partner, and Grogan from sources other than the intercepted conversations. Walker assumed that information about a personal trip by Forsyth and Charles Bruton was overheard. *See* note 5, *supra*. The information about Charles Bruton participating in a drug deal was overheard also. *See* note 5.

Walker decided to conduct a preliminary internal affairs investigation of the charges. Such investigations are conducted to ensure the integrity of the police department. They are not considered formal complaints; and,

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together; that Forsyth possibly had covered up, or arranged for charges to be dropped regarding, a murder-for-hire scheme in which Charles and Susan Bruton tried to kill her ex-husband; that Forsyth had misrepresented to a state judge the nature of Charles Bruton's work as an informant for her; that Charles Bruton was to receive "half the dope" in a narcotics deal; and that Forsyth knew that Charles Bruton had convinced a Darrell Smallwood to burglarize Grogan's house, but had failed to see that charges were filed against either of them. As to the burglary, Barr told Walker that he learned about it from visiting Smallwood in jail.

Walker was also informed that Grogan had understood from prior conversations with Mrs. Dulworth that the City had made a deal with Charles Bruton to allow him to illegally mine Grogan's property; and that Mrs. Dulworth had told Grogan that she overheard on her telephone: that some environmental matters needed handling, that Charles Bruton was calling for "Jan" (Forsyth) and that Jan was the only one who could control Bruton, that there were dead bodies and dead dogs on the property (unclear whether Grogan's or Brutons'), and that Charles Bruton was being protected by Dallas police officers.

unless a violation is identified, they are not reflected in the personnel record of the investigated employee.

On either September 22 or 23, Walker informed appellee Rollins (the supervisor of Forsyth and Kirks' undercover investigation) about the meeting with Barr and the charges against Forsyth. In turn, on either September 22 or 23, Rollins informed Lieutenant Lybrand (one of Forsyth and Kirks' supervisors) about the charges. Lybrand advised Rollins that the police department should investigate whether a wiretap was in place; Rollins responded that any investigation should be performed by the FBI.

With Lybrand present, Rollins met on September 23 with Kirks and Forsyth, informed Forsyth that a complaint had been filed against her, and instructed them not to discuss police business over the Brutons' telephone or to tell anyone that he had given them that order. Kirks and Forsyth left the meeting believing that there was a "legal wiretap" on the Brutons' line, although neither Rollins nor Lybrand told them anything about a wiretap. They interpreted Rollins' instructions as permitting non-business discussions, and continued to have conversations on the line after September 23.[6] Rollins assumed that business was the extent of the relationship between

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[6] Kirks' deposition testimony is inconsistent on whether he and Forsyth followed Rollins' instructions not to discuss police business on the line. Although Kirks initially testified that they had complied with the order, he later testified that not all of the calls made after Rollins gave the order were personal.

the Brutons and Kirks and Forsyth,[7] and did not anticipate that the officers would continue to use the Brutons' telephone.

Shortly after the September 22 meeting with Walker, Grogan contacted City Manager Richard Knight about the matter, because Mrs. Dulworth had advised Grogan that she had overheard another telephone conversation in which Charles Bruton had said that the telephone line was "hot". Grogan concluded that Walker had disclosed to Forsyth and Kirks the information received from Barr and him (Grogan). At Knight's request, appellee Vines, the Chief of Police, met with Grogan. Vines was kept apprised of the progress of the internal affairs investigation.

On September 26, Walker gave his notes from the September 22 meeting to Detective Jennings of the Internal Affairs Division, and described that meeting and the charges against Forsyth. In conducting the preliminary investigation, the appellees used the information received on September 22 from Grogan, Barr, and his partner, including the information obtained from intercepted conversations and that obtained from other sources.

Jennings interviewed Barr on October 3, regarding the condition of the Dulworths' telephone and the

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[7] In support of their motion for summary judgment, the appellees submitted a copy of the procedures for dealing with informants, including the following: "The relationship between an officer and an informant should always be strictly professional".

charges.[8] That same day, after interviewing Barr, Jennings contacted Southwestern Bell Telephone Company and requested a check on the Dulworths' telephone line. In response, a Southwestern Bell employee went to the Dulworths' home the next day, October 4. With Charles Bruton present, the employee located and disconnected a spliced wire connecting the Dulworths' and Brutons' lines. Bruton told the employee that he knew that the Dulworths had been "wiretapping" or "listening in" on his telephone.[9] The employee removed the connectors and gave them to Charles Bruton, who turned them over to Kirks. Later, Jennings gave them to the FBI.

Upon completing the internal affairs report, Jennings forwarded it to the chain of command on November 2, 1988. The investigation resulted in charges against Forsyth being classified as "unfounded".

Forsyth and Kirks filed suit against Barr, Grogan, the Dulworths, the City, Vines, Rollins, and Walker in February 1989. They alleged that the Dulworths "entered into an illegal agreement with BARR and GROGAN to illegally intercept and/or record and/or illegally use information from telephone conversations" between Charles Bruton and Forsyth and Kirks; and that Vines, Rollins, and Walker, on behalf of the City, "knowingly accepted

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[8] Jennings did not interview Barr earlier because of the illness and death of Barr's father.

[9] Charles Bruton stated by affidavit that a Bobby Woods told him "in late September" that his (Bruton's) telephone was tapped by the Dulworths or that they were listening to conversations. Forsyth stated by affidavit that, on September 25, 1988, Woods told Bruton about the eavesdropping.

and used information illegally intercepted from [such] telephone conversations". In August 1989, the action was consolidated with a similar case filed by Charles and Susan Bruton.[10]

In April 1991, the appellees (City, Walker, Vines, and Rollins) moved for summary judgment; and the district court granted summary judgment that November, later denying a motion for reconsideration. The appellants settled their claims against Barr, Grogan, and the Dulworths; those claims were dismissed in November 1992.

II.

The standards for a summary judgment and our plenary review of it are well established and should be well known. *E.g., LeJeune v. Shell Oil Co.*, 950 F.2d 267, 268 (5th Cir.1992). But, because of the factually driven interception claim in this case, and the appellants' failure to comply in some instances with the procedure for showing a material fact issue for that claim, they bear repeating in some detail.

We employ the same criteria as the district court, viewing all facts, and the inferences to be drawn from them, in the light most favorable to the non-movants. *Id.* at 268. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

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[10] Southwestern Bell was named as a defendant in the Brutons' original complaint, and in Forsyth and Kirks' first amended complaint. On the appellants' motion, Southwestern Bell was dismissed.

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "[T]he substantive law will identify which facts are material". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "[A] dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party". *Id.* at 248, 106 S.Ct. at 2510; *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The movant has the initial burden of demonstrating the absence of a material fact issue. *St. Paul Ins. Co. v. AFIA Worldwide Ins. Co.*, 937 F.2d 274, 279-80 & n. 6 (5th Cir.1991). If it satisfies that burden, the non-movant must identify specific evidence in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof at trial. Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Needless to say, unsubstantiated assertions are not competent summary judgment evidence. *Id.* at 324, 106 S.Ct. at 2553. "Summary judgment, to be sure, may be appropriate, even in cases where elusive concepts such as motive or intent are at issue, . . . if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Krim v. Banc-Texas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir.1993).

As the basis for civil recovery, the appellants claimed violations of Title III of the Omnibus Crime Control and

Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2521 (the Act), alleging the intentional interception, disclosure, and use of wire communications.[11] (The Act frequently makes reference to "this chapter"; for purposes of this opinion, it is found in Chapter 119 of 18 U.S.C.) The district court granted summary judgment on the grounds that (1) there was no evidence that the appellees had intercepted the conversations; and (2) the appellees did not violate the Act either by disclosing to other officials, for purposes of the internal affairs investigation, information obtained from an illegal wiretap, § 2517(1), or by using that information in the investigation, § 2517(2).[12]

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[11] Section 2520, which authorizes civil recovery for violations of the Act, states in pertinent part:

> [A]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C. § 2520(a).

[12] The district court did not base its ruling on the individual appellees' qualified immunity claim. Of course, even if we were to conclude that the reasons given by the district court do not support summary judgment, we may affirm it on any other grounds supported by the record. *E.g., Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1146 (5th Cir.1993). In any event, as discussed *infra*, we affirm on grounds relied upon by the district court.

"[The Act] has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *Gelbard v. United States*, 408 U.S. 41, 48, 92 S.Ct. 2357, 2361, 33 L.Ed.2d 179 (1972) (quoting S.Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153).

> [The Act] authorizes the interception of private wire and oral communications, but only when law enforcement officials are investigating specified serious crimes and receive prior judicial approval, an approval that may not be given except upon compliance with stringent conditions. . . . Unauthorized interceptions and the disclosure or use of information obtained through unauthorized interceptions are crimes, . . . and the victim of such interception, disclosure, or use is entitled to recover civil damages. . . . [The Act] also bars the use as evidence before official bodies of the contents and fruits of illegal interceptions, . . . and provides procedures for moving to suppress such evidence in various proceedings. . . .

Id. at 46, 92 S.Ct. at 2360. "[A]lthough [the Act] authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern". *Id.* at 48, 92 S.Ct. at 2361. "The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression." *United States v. United States District Court*, 407 U.S. 297, 301-02, 92 S.Ct. 2125, 2128-29, 32 L.Ed.2d 752 (1972).

A.

Except as authorized, the Act prohibits the intentional interception of wire communications.[13] "A telephone conversation is a wire communication." *Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414, 417 (5th Cir.1980).[14] "Intercept" is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device". 18 U.S.C. § 2510(4). And, "the wording of the statute, while broad, requires that interceptions be intentional before liability attaches, thereby excluding inadvertent interceptions". *Thompson v. Dulaney*, 970 F.2d 744, 748 (10th Cir.1992).[15] An

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[13] The Act provides, in relevant part:

> (1) Except as otherwise specifically provided in this chapter[,] any person who –
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . .
>
> shall be subject to suit. . . .

18 U.S.C. § 2511(1)(a). As noted, "this chapter", as used in the foregoing section, refers to the Act.

[14] "Wire communications, unlike oral communications, are protected against interception by electronic, mechanical, and other devices regardless of the speaker's expectation of privacy". *Briggs*, 630 F.2d at 417 n. 4.

[15] In *United States v. Savage*, 564 F.2d 728 (5th Cir.1977), our court, addressing a situation in which a motel switchboard operator stayed on the telephone line and overheard a suspicious conversation, stated:

> We find no evidence that Congress in passing [the Act] . . . intended such conduct to be unlawful. . . . This is not the case of an illegal wiretap by the

"interception" "require[s] participation by the one charged with an 'interception' in the contemporaneous acquisition of the communication through the use of the device." *United States v. Turk*, 526 F.2d 654, 658 (5th Cir.), *cert. denied*, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976).[16] "[N]o new and distinct interception occurs when the contents of a communication are revealed through the replaying of a previous recording." *Id.* at 659.

Appellants conceded at oral argument that the appellees did not install any device or listen to any conversations; nor is there any evidence either that the appellees

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> Government or the case of a malicious violation of one person's privacy by another through intentional eavesdropping. It is the simple case of a motel switchboard operator who inadvertently heard a suspicious conversation in the course of her employment and in good faith told a policeman what she had heard. The telephone conversation was therefore admissible as evidence [in the criminal prosecution].

Id. at 732.

Similarly, in *United States v. Campagnuolo*, 592 F.2d 852 (5th Cir.1979), an FBI agent reconnected an unplugged telephone during the execution of a search warrant and received 42 calls. Our court held that this did not violate the Act, despite the fact that the FBI never obtained judicial authorization for the challenged activity: "Even if we assume that these actions constituted an 'interception' under [the Act], it is clear that they did not violate that statutory scheme." *Id.* at 862.

[16] On summary judgment, the non-movant "can raise a question of fact regarding . . . actual interception of his conversations without proving the contents of specific conversations allegedly intercepted". *Walker v. Darby*, 911 F.2d 1573, 1578 (11th Cir.1990).

actually participated in causing the lines to be wired so that the Dulworths could intercept the conversations, or that, prior to the September 22 meeting between Barr, Grogan, and appellee Walker, the appellees had any knowledge that the Dulworths were able to do so. Nevertheless, the appellants assert that the appellees are liable for intercepting those conversations. As factual support for this claim, they rely in large part on the fact that the appellees, after learning about the Dulworths' ability to intercept, allowed the situation to continue for almost two weeks before having a possible wiretap investigated. They also claim a conspiracy, maintaining that the appellees are therefore liable for the alleged illegal interception, even if they did not participate in it.

In support of their summary judgment motion, the appellees submitted considerable evidence that, after the September 22 meeting, no City employee, including appellees Walker, Rollins, or Vines, procured anyone to monitor the calls. This evidence included Joyce Dulworth's deposition testimony that she did not have an agreement with the City or any police officers to furnish them information that she intercepted; that Jennings did not ask her to notify him if she intercepted anything else; and that no one told her to listen to future calls. Likewise, in their affidavits, Walker and Rollins stated that they did not have an agreement with anyone that the contents of intercepted conversations would be reported to them or anyone else.

The appellees also submitted evidence pointing out the weaknesses in the evidence supporting the appellants' interception claims, including Forsyth's, Kirks', and Susan

Bruton's deposition testimony, which reflects only conclusory, unsubstantiated claims that the appellees arranged to receive additional information after the September 22 meeting,[17] and Kirks' and Forsyth's interrogatory answers.

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[17] Forsyth testified:

> Q: Do you have any knowledge, either firsthand or hearsay knowledge, that the police department made some kind of arrangement with anyone to continue to receive information from Mrs. Dul[ ]worth or any of the Dul[ ]worths after September 22nd, 1988?
>
> A: By leaving the telephone tap in place, which allowed the Dul[ ]worths to continue to monitor conversations and to continue to get back to Grogan and continue to get back to John Barr, who returned to the police department with more information off the telephone, yes.
>
> Q: I'm asking you if you have any evidence or any information about an affirmative agreement between the Dallas Police Department and anyone else that they would give further information to the Dallas Police Department?
>
> A: Other than the fact that John Barr told the Internal Affairs Division that he didn't want the Dul[ ]worths bothered in so many words; that he had more information that he had, based on hearsay; and he was planning to come back with more information. The telephone remained unsecure. They did not call Southwestern Bell. They allowed the telephone to remain in place. All those indicate to me that they had an agreement.

Kirks testified:

> A. I think it is a matter of record of what Jagg[ ]i [an assistant City Attorney] told them. He says it is a wiretap. Get away from it.

When asked what actions by Vines, Rollins, and Walker violated the Act, they responded that each "illegally *used*

. . . .

And if he is telling them it is a wiretap and to get away from it and they don't get away from it, they do continue to monitor, then in all likelihood they are going to come back and try to cover their butts and lie, and they did lie, and they are still lying today. That's speculation, but I am sure going to court with it.

Q. So it is your contention that Louis Jagg[ ]i told them not to monitor the phones and they did it anyway?

A. Absolutely.

. . . .

They are monitoring it. They are also intercepting it, even though they are procuring another person to do it.

Q. Whom did they procure to do it for them?

A. I don't know. John Barr and George Grogan are the one[s] that brought it up to the I.A.D. [Internal Affairs Division] complaint.

Q. So you think they had an arrangement with John Barr and George Grogan that they were supposed to keep them posted or go out there and gather more information?

A. Certainly. Why else would they leave it in place? . . . .

(Claiming the attorney-client privilege, the City consistently objected to the appellants' attempts to testify about advice allegedly given to Walker and Rollins by attorneys with the City Attorney's Office.)

Susan Bruton testified:

Q. Specifically, what is it in this case that the City of Dallas did which acted in furtherance of the unlawful telephone activities?

A. They permitted the wiretap to continue.

information obtained from an illegal telephone interception"; illegal interception *by the appellees* was not claimed. (Emphasis added.) Another interrogatory asked the appellants to state the factual basis for their assertion that Walker, Rollins, and Vines prearranged to receive illegally intercepted information. In essence, they responded that the appellees, *after* being made aware on September 22 of the interception, continued to receive information from intercepted conversations, and failed to take steps to have the tap removed until October 4.[18]

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[18] Forsyth and Kirks responded to the interrogatory as follows:

> On September 22, 1988[,] the police officials were made aware of the telephone conversations that were illegally intercepted, used and disclosed. Because the illegally intercepted telephone conversations involved two of their employees, they attempted to continue to monitor these conversations by seeking advice from [the] City Attorney's Office. When they realized the illegality of the situation they not only failed to check for a device which enabled these conversations to be illegally intercepted by a known target who was in the Targeted Offender Program in the Intelligence Division, but they also continued to receive information provided by the Targeted Offender's family as they continued to listen in to more illegally intercepted telephone conversations. When Detective Jennings sent Southwestern Bell to the location to check for a device enabling these illegally intercepted telephone conversations on October 4, 1988[,] a device was in fact removed. When the police officials learned that Southwestern Bell had in fact removed a device they became very upset that this was done without their approval. The

1.

With their response to the summary judgment motion, the appellants filed two volumes of evidentiary material, tabbed "A" through "VV", but referred specifically to only four items: Tab "A", the 177-page internal affairs investigation report and attachments (without pointing to any specific portions of this document); and Tabs "B", "C", and "E" – the individual appellees' interrogatory answers regarding the basis for their good faith defenses. These specific references were cited in opposition to the individual appellees' qualified immunity claim.

When the movant has made a properly supported motion for summary judgment by demonstrating an absence of evidence to support the non-movants' case, as the appellees did, the non-movants must "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate *'specific facts showing that there is a genuine issue for trial'*." *Celotex Corp. v. Catrett*, 477 U.S. at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(e)) (emphasis added); *see also Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.

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aforementioned circumstances could hardly be characterized as "inadvertent".

Susan and Charles Bruton responded to this same interrogatory as follows:

> Do not understand question. The information is in Dallas Police Department I.A.D. file and depositions of Lt. Jennings and John James indicated that these defendants had knowledge and did nothing to correct the situation.

7 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 98, 121 L.Ed.2d 59 (1992).

Accordingly, the appellants had the burden of presenting evidence sufficient to demonstrate the existence of a material fact issue on whether the appellees intentionally intercepted their conversations. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 257, 106 S.Ct. at 2514-15. To satisfy this burden, they were required to identify specific evidence in the record, and to articulate the "precise manner" in which that evidence supported their claim. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992); *see also Krim v. BancTexas Group, Inc.*, 989 F.2d at 1443.

They did not do so. Instead, they offered only vague, conclusory assertions that their "evidentiary materials . . . demonstrate circumstantial evidence of a conspiracy and/or joint action on the part of Vines, Walker, Rollins, and the City"; that "there is clear evidence that the aim of the conspiracy was to use information from illegally intercepted telephone conversations presented to these Defendants by Barr, Grogan and the Dulworths"; and that "there is abundant evidence, both circumstantial and direct, that would allow a jury to find that the City and its employee Defendants worked together to accomplish and cause an[ ] illegal wiretap to remain in place and thereafter use information obtained from an illegal wiretap in violation of . . . [the Act]". But, although they submitted two volumes of evidentiary material, they did not identify the specific portions of such evidence (if any) that supported their illegal interception claim. The appellants' response and supporting evidence are insufficient to preclude summary judgment. "Rule 56 does not

impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment". *Skotak*, 953 F.2d at 915 & n. 7.

Nor is it our duty to do so on appeal. The appellants' opening brief contains similar conclusory assertions that they presented direct and circumstantial evidence that the appellees conspired with Barr, Grogan, and the Dulworths. But, contrary to Fed.R.App.P. 28(a)(5), they furnished no record cites to such evidence. In their reply brief, for the first time, they attempt to designate specific portions of the record to support their opposition to summary judgment. This attempt comes far too late – obviously, it should have been done in the district court. *See, e.g., Topalian*, 954 F.2d at 1131-32 n. 10; *cf. United States v. Prince*, 868 F.2d 1379, 1386 (5th Cir.) ("This Court will not consider a new claim raised for the first time in an appellate reply brief".), *cert. denied*, 493 U.S. 932, 110 S.Ct. 321, 107 L.Ed.2d 312 (1989).

2.

But, even if we were to consider the evidentiary material designated for the first time in the reply brief, we would still affirm summary judgment on the interception claim. That evidence, viewed in the light most favorable to the appellants, establishes only that the appellees (1) knew that some of the information related to Walker at the September 22 meeting was obtained from telephone conversations overheard by Mrs. Dulworth, and (2) failed to investigate promptly a possible wiretap.

This notwithstanding, relying on *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), the appellants maintain that the appellees did not satisfy

their initial burden under Rule 56 because they "failed [to] produce evidence which would completely nullify any inference of a conspiracy". This reliance is misplaced because, unlike the plaintiff in *Adickes*, the appellants did not plead conspiracy. *See id.* at 148, 90 S.Ct. at 1603. Therefore, the appellees, as part of their summary judgment burden, were not required to demonstrate the absence of a material fact issue as to conspiracy. Nevertheless, as described above, they submitted considerable evidence negating its existence. And, as also described earlier, this evidence was not refuted by the appellants in a manner sufficient to satisfy Rule 56.

In light of the appellants' scant proof, a reasonable jury could not return a verdict for them (non-movants) on the claim that the appellees intentionally intercepted, endeavored to intercept, or procured anyone to intercept, the conversations; therefore, there was not a material fact issue on this claim.[19] Accordingly, summary judgment on the interception claim is proper.

B.

With certain exceptions, § 2511(1)(c) and (d) of the Act prohibit the intentional disclosure or use of information obtained through a wire intercept if the person doing so "knew or had reason to know that the interception itself was in violation of [the Act]". *United States v.*

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[19] We note that some of that evidence is challenged by the appellees as inadmissible hearsay or, again, as being based on matters within the scope of the attorney-client privilege. We need not reach those contentions; even considering the challenged evidence, a material fact issue is lacking.

Wuliger, 981 F.2d 1497, 1501 (6th Cir.1992).[20] Liability for disclosure or use requires proof that it was intentional, that the information was obtained from an intercepted communication, and that the defendant knew or should have known that the interception was illegal.[21]

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[20] The Act provides in pertinent part:

> (1) Except as otherwise specifically provided in this chapter any person who –
>
> . . . .
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> shall be punished . . . or shall be subject to suit. . . .

18 U.S.C. § 2511(1)(c) and (d).

[21] Liability for *intercepting* or procuring another to intercept communications under subsections (a) and (b) of § 2511(1) requires that a plaintiff prove intentional conduct. However, liability under subsections (c) and (d) of § 2511(1) for *use and disclosure* of information obtained from the contents of intercepted communications requires more. The use or disclosure must still be intentional, but in addition, a plaintiff must show that a defendant "know[s] or ha[s] reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this

Accordingly, "knowledge or reason to know of the illegality is an element of this offense". *Id.*

Although there is a factual dispute as to when or whether the appellees knew, or should have known, that the communications might have been intercepted illegally, it is undisputed that, in connection with conducting the preliminary internal affairs investigation, and without investigating the legality of the interception, the appellees (1) disclosed the contents of intercepted communications to other law enforcement officers; and (2) used those contents – to the extent that the charges against

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> subsection." This language, found in each of subsections (c) and (d), compels the conclusion that, to establish liability under one of those sections, a plaintiff must demonstrate a greater degree of knowledge on the part of a defendant. The defendant must know 1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of [the Act].
>
> Although a defendant may be presumed to know the law, . . . to establish use and disclosure liability under [the Act], a defendant must be shown to have been aware of the factual circumstances that would violate the statute. For example, it is not enough to show that a defendant merely knew he was using or disclosing information from an intercepted communication. It must also be shown that the defendant knew, *inter alia*, that neither party to the intercepted conversation had consented to the interception.

Thompson v. Dulaney, 970 F.2d at 749 (emphasis in original; citations omitted).

Forsyth were based on the communications.[22] We assume an illegal interception.[23] Civil liability for such disclosure and use, in such an investigation, of information derived from an illegal interception, when the information was obtained from a third party interceptor without wrongdoing by the officers, appears to be an issue of first impression.

The appellees maintain that the summary judgment on the disclosure and use claim can be affirmed on two separate bases: (1) the interception was impliedly consented to by the appellants, each of whom used the Brutons' telephone with awareness that it was not secure; and (2) the disclosure and use were authorized by the Act, § 2517(1) and (2). In addition, the individual appellees (Vines, Walker, and Rollins) claim qualified immunity, asserting that there was no clearly established law that an internal investigation of a police officer, based upon information presented to her superiors that was overheard by a third party, violates the Act. And, the City maintains that the Act does not permit municipal liability. *See* 18 U.S.C. § 2520(a) (Supp.1993). Because we hold that the disclosure and use were permitted by § 2517(1) and (2), we need not reach the other issues.[24]

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[22] It is not clear from the record whether some, or all, of the contents were disclosed and used. Because we view the evidence in the light most favorable to the non-movants, we assume the latter.

[23] Because of possible defenses, such as consent, *see* § 2511(2)(c), (d), we do not reach whether the interception by either the Dulworths, or Barr, or Grogan was illegal. As noted, the appellants settled with each.

[24] As discussed *infra*, whether the Act proscribes the disclosure and use is a difficult issue. This militates in favor of

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At the outset, we reject the appellants' contention that illegally intercepted information cannot be used for any purpose whatsoever. In support, they rely on § 2515, which provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515.[25]

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reaching the qualified immunity claim instead. But, even if the individual defendants/appellees were sheltered by such immunity, the liability *vel non* of the City would remain; and that issue calls into play a statutory construction question that is perhaps as difficult, if not more so, than that for disclosure and use. *See, e.g.*, 18 U.S.C. §§ 2510(6), 2511(1), 2520(a) (amended in 1986 to include any "entity" as a party from which civil recovery is permitted); *Bodunde v. Parizek*, 1993 WL 189941 (N.D.Ill.1993); *PBA Local No. 38 v. Woodbridge Police Department*, 832 F.Supp. 808 (D.N.J.1993); *Amati v. City of Woodstock*, IL, 829 F.Supp. 998 (N.D.Ill.1993). For this reason, and because addressing whether disclosure and use is statutorily permitted pertains to all of the defendants/appellees, we address that issue.

[25] Our court has described § 2515 as "poorly drafted":

> Read literally, the provision is circular; it proscribes the reception into evidence (and thus the disclosure) of information the disclosure of which "would be in

Section 2515 is "the statutory exclusionary rule". *Fleming v. United States*, 547 F.2d 872, 873 (5th Cir.), *cert. denied*, 434 U.S. 831, 98 S.Ct. 113, 54 L.Ed.2d 90 (1977); *see also United States v. Wuliger*, 981 F.2d at 1505 (same); *United States v. Cianfrani*, 573 F.2d 835, 855 (3d Cir.1978) (same); *United States v. Phillips*, 540 F.2d 319, 325 (8th Cir.) (§ 2515 "imposes an evidentiary sanction to compel compliance with § 2511"), *cert. denied*, 429 U.S. 1000, 97 S.Ct. 530, 50 L.Ed.2d 611 (1976). It "serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings' ". *Gelbard*, 408 U.S. at 51, 92 S.Ct. at 2362-63 (footnote omitted).

Section 2515 is not applicable. The intercepted information was used only in the sense that it was investigated because it was the basis for some of the charges

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violation of this chapter." "Disclosure" apparently refers to disclosure at trial rather than disclosure among various departments of the government at some earlier point; otherwise, the statute would presumably refer to information the disclosure of which "has been" in violation of the chapter. At any rate, the provision should not be read in an overly literal fashion. The section's primary purpose is apparently to exclude evidence derived from illegal, rather than legal, wiretaps. The section's main thrust is therefore to exclude evidence the *seizure* of which was in violation of the chapter, not evidence the *disclosure* of which was or would be in violation of the chapter.

Fleming v. United States, 547 F.2d 872, 874 (5th Cir.), *cert. denied*, 434 U.S. 831, 98 S.Ct. 113, 54 L.Ed.2d 90 (1977).

against a police officer. The information was not offered or introduced into evidence at any trial, hearing, or proceeding, but was instead the subject of an investigation. The Dallas Police Department General Orders Code of Conduct (1988), submitted by the appellees in support of their summary judgment motion, provides for complaint investigations to be classified as either "formal, preliminary, or summary (informal)". As noted, preliminary investigations, such as the one at issue, do "not reflect on the personnel record of any member involved unless a violation is identified, in which case a formal complaint will be authorized by the Internal Affairs Division Commander". The investigation was conducted through telephone and personal interviews and written reports; there was no hearing or other proceeding in which evidence was introduced.

We agree with the Court of Appeals for the District of Columbia that "[t]he statutory context . . . in which 'proceeding' appears in company with 'trial' and 'hearing,' suggests something similarly adversarial – not an *ex parte* administrative determination of the sort here at issue [a non-responsibility determination made by an Air Force contracting officer]". *Cubic Corp. v. Cheney*, 914 F.2d 1501, 1504 (D.C.Cir.1990). The title of § 2515 – "Prohibition of use *as evidence* of intercepted wire or oral communications" (emphasis added) – clearly supports that interpretation. As the *Cubic Corp.* court noted, § 2515 also contains "an express reference to the powers of 'the judge' before whom the 'motion to suppress' is to be made. . . . The more sensible reading is that the statute applies only to an adversarial proceeding, like a trial or

other hearing, before a 'judge.' " *Id.* at 1504. That reasoning applies with equal force here. A preliminary internal affairs investigation is not a realistic forum in which to move to suppress the wiretap information, because it does not include any sort of "hearing" at which a judge presides.[26]

The *Cubic* court pointed out that the legality of the use of intercepted information could be challenged "when a court reviews an administrative decision on a record that allegedly contains unlawfully intercepted wiretap information", by moving to suppress under

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[26] The *Cubic* court stated:

> As a practical matter, . . . an *ex parte* administrative determination is not a realistic forum in which to raise a Title III claim. The party to which the wiretap information applies would have to be given an opportunity to make something like a 'motion to suppress' the information before the agency could consider it, a hearing would have to be convened, and a . . . judge brought in to preside. Meanwhile, the agency could not make a decision, or at least not a decision adverse to the subject of the wiretap information. All this seems like a most improbable way of doing business, and until the agency actually makes an adverse decision based upon the wiretap information, an unnecessary complication, too. Without clearer congressional direction to that effect, we are reluctant to conclude that [the Act] was meant to be so disruptive a force in the administrative process.

914 F.2d at 1504.

§ 2518. *Id.* at 1506.[27] Similarly, if the internal affairs investigation had identified a violation and a formal complaint had been filed, resulting in an adverse determination, Forsyth and Kirks would have been free to challenge in court the Internal Affairs Division's reliance on information derived from the wiretap.

Moreover, even in the context of an adversarial proceeding to which § 2515 applies, that section does not preclude *all* use of illegally intercepted information. For example, in *United States v. Caron*, 474 F.2d 506, 508-10 (5th Cir.1973), our court held that unlawfully intercepted information may be used for impeachment. Three other circuits also have recognized this impeachment exception in criminal cases. *United States v. Echavarria-Olarte*, 904 F.2d 1391 (9th Cir.1990); *United States v. Vest*, 813 F.2d 477, 484 (1st Cir.1987) (recognizing impeachment exception,

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[27] The *Cubic* court noted:

> Our decision does not preclude the Air Force from considering untested wiretap information in making a non-responsibility determination, without thereby creating a right in anyone to challenge the provenance of that information. If the agency's decision is challenged in a subsequent judicial proceeding, however, an aggrieved person has the same right to move to suppress the information as that person would have if the agency were formally moving the admission of the information in evidence before the court. In other words, if an agency relies upon wiretap evidence in rendering a reviewable decision, it must be prepared to defend in court the legality, under [the Act], of the wiretap that produced it.

Id. at 1506.

but declining "to read into [§] 2515 an exception permitting the use of illegally-intercepted communications in perjury prosecutions"); *Anthony v. United States*, 667 F.2d 870 (10th Cir.1981), *cert. denied*, 457 U.S. 1133, 102 S.Ct. 2959, 73 L.Ed.2d 1350 (1982).[28]

Finally, § 2515 is not self-executing, but is instead dependent upon a motion to suppress, pursuant to § 2518(10)(a) (any aggrieved person may move to suppress the contents of any unlawfully intercepted communication). That section "provides the remedy for the right created by [§] 2515." S.Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2195; *see United States v. Cianfrani*, 573 F.2d at 855; *United States v. Phillips*, 540 F.2d at 325; *In re Evans*, 452 F.2d 1239, 1243-44 (D.C.Cir.1971) ("the committee report which accompanied the Act explicitly indicated the committee's expectation that § 2518(10)(a) would be read as the remedy for, and hence limitation on the 'right' created by § 2515"), *cert. denied*, 408 U.S. 930, 92 S.Ct. 2479, 33 L.Ed.2d 342 (1972).

Based on the foregoing, § 2515 cannot bear the weight appellants assign it. A police department internal affairs division's disclosure or use of information, furnished by a

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[28] The impeachment exception has not been extended to civil cases. *Williams v. Poulos*, 11 F.3d 271, 288 (1st Cir.1993); *United States v. Wuliger*, 981 F.2d at 1506; *Anthony v. United States*, 667 F.2d at 879; *cf. United States v. Farese*, 611 F.2d 67, 71 (5th Cir.1980) (although § 2515 does not apply to evidence used solely for impeachment purposes, Congress "did not intend to make an exception for sentencing hearings, bail revocation hearings, or any other proceeding in which evidence is being introduced affirmatively by the government").

third party, to conduct a preliminary investigation in a non-adversarial context is not a violation of § 2515; it cannot support a civil action under the Act. Such an action must be grounded, instead, on violations of §§ 2511(1)(c) (disclosure) and (d) (use).[29] As noted, in such an action, the plaintiff "must demonstrate '1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of [the Act]' ". *Williams v. Poulos*, 11 F.3d at 284 (quoting *Thompson v. Dulaney*, 970 F.2d at 749). "This demonstration includes a showing that any statutory exceptions asserted by a defendant do not, in fact, apply". *Id.* Accordingly, we turn to the exceptions claimed to be found in § 2517(1) and (2).

2.

Subsections 2511(1)(c) and (d) are qualified by the introductory phrase, "Except as otherwise specifically provided in this chapter [the Act]". 18 U.S.C. § 2511(1). In other words, although the disclosure or use of illegally intercepted communications by a person who knows or should know of the illegality of the interception is usually proscribed, it may be authorized under other provisions of the Act. And, as stated, the district court held that, in conducting the investigation, the appellees' disclosure (to other law enforcement officers) and use of the intercepted

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[29] Of course, liability may lie under § 2511(1)(a) against a person who intercepted, or procured another to intercept, the communications. As noted, the appellants settled with the claimed interceptors – the Dulworths, Barr and Grogan.

information were authorized by § 2517(1) and (2). Those subsections provide that a "law enforcement officer who, by any means authorized by this chapter [the Act], has obtained knowledge of the contents of" intercepted communications, may disclose or use those contents as "appropriate to the proper performance of [his] official duties".[30]

These subsections provide "for limited non-public disclosure. Disclosure by one law enforcement officer to another, and use of a communication by a law enforcement officer in the performance of his duty, are authorized if such disclosure or use is appropriate to the 'proper performance of the official duties of the officer' ". *United States v. Cianfrani,* 573 F.2d at 855 n. 7. The statutory phrase, "appropriate to the proper performance of

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[30] The Act states in relevant part:

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

18 U.S.C. § 2517(1) and (2).

the [officer's] official duties" was "designed to protect the public from unnecessarily widespread dissemination of the contents of interceptions and from the wholesale use of [such] information . . . by an officer . . . for personal or illegal purposes". *United States v. Daniel*, 667 F.2d 783, 784 (9th Cir.1982) (quoting *United States v. Hall*, 543 F.2d 1229, 1233 (9th Cir.1976) (en banc), *cert. denied*, 429 U.S. 1075, 97 S.Ct. 814, 50 L.Ed.2d 793 (1977)).

Vines, Walker, and Rollins are "law enforcement officers" within the meaning of §§ 2517(1) and (2) and 2510(7).[31] And, their disclosure and use of information related to them by Barr and Grogan was "appropriate to the proper performance of [their] official duties", as required by § 2517(1) and (2); appellants do not claim otherwise.[32] Rather, the dispute centers solely on whether the officers obtained the information by a "means authorized by" the Act, as also required by § 2517(1) and (2).

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[31] The Act defines "investigative or law enforcement officer" as:

> any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

18 U.S.C. § 2510(7). It is undisputed that Vines, Walker, and Rollins fall within this definition.

[32] The Dallas Police Department General Orders for 1988 require the Internal Affairs Division to "[e]nsure the complete and impartial investigation of all complaints against any employee of the Department". Those Orders provide further that "[a]n investigation will be conducted into all allegations of criminal misconduct *regardless of the source*". (Emphasis added.)

The appellants contend that the district court created an "internal affairs" exception not sanctioned by the Act, asserting that the phrase "by any means authorized by this chapter" in § 2517(1) and (2) limits disclosure and use to only information obtained through a judicially authorized wiretap.[33]

The Act ("this chapter") includes only 12 sections. The phrase "by any means authorized by this chapter" in § 2517 is not covered in the definitions section, § 2510. Section 2511 does provide for lawful intercepts without a judicial order, such as when, under certain circumstances, the interceptor is also a party to the communication, or a party to the communication has given prior consent. *See* 18 U.S.C. § 2511(2)(c) and (d). But, the Act does not address expressly someone unlawfully intercepting a communication, and then providing that information to law enforcement officers.

Because the plain wording of the Act does not address the situation at hand, we must engage in statutory construction. In so doing, we are aware from our court's past experiences, as reflected in part in note 25, *supra*, that construction of the Wiretap Act is fraught with trip wires. *See, e.g., Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414 (5th Cir.1980); *Fleming v. United States*, 547 F.2d at 873 ("Our analysis of . . . [§§ 2515 and 2517] makes us confident of only one conclusion: the statute is not a model of clarity"); *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141

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[33] Of course, the Act provides that information intercepted in specified other ways does not run afoul of its general proscription against interceptions. *See, e.g.*, § 2511(2)(c) and (d).

(1974). As hereinafter reflected, construction of § 2517(1) and (2) is no exception; we balance on a high wire. The one clear, and most helpful, signal is the legislative history, quoted later.

As described, § 2517(1) and (2) concern "investigative or law enforcement officer[s] who, by any means authorized by this chapter, [have] obtained knowledge" of communications, and provide that they may disclose or use such contents as "appropriate to the proper performance of the official duties of the officer [either] making or receiving the disclosure", or using the information. Section 2517, read as a whole, runs counter to appellants' contention that the phrase "by any means authorized by this chapter [the Act]" limits disclosure and use under § 2517(1) and (2) to that information obtained either through a judicially-authorized wiretap or otherwise in accordance with the Act.

The plain wording of § 2517(3) aids in convincing us that disclosure and use under § 2517(1) and (2) of unlawfully intercepted information that is otherwise conveyed lawfully to law enforcement officers is permitted; in sum, that information disclosed or used under those subsections need not be only that which is intercepted "in accordance with" the Act:

> Any person who has received, *by any means authorized by this chapter,* any information concerning a wire, oral, or electronic communication, or evidence derived therefrom *intercepted in accordance with the provisions of this chapter* may disclose the contents of that communication or such derivative evidence while giving

> testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

18 U.S.C. § 2517(3) (emphasis added). This subsection, while using the phrase "by any means authorized by this chapter" also found in § 2517(1) and (2), uses a phrase not found there: "intercepted in accordance with the provisions of this chapter". In other words, anyone who lawfully receives information *that was also intercepted in compliance with the Act* is allowed greater disclosure of that information than is permitted by the more narrow boundaries of § 2517(1) and (2); that person may disclose that information through testimony in designated proceedings. And, obviously, had Congress wanted to likewise limit § 2517(1) and (2) disclosure and use to only that information "intercepted in accordance with" the Act, it knew how to say so.

Furthermore, to read § 2517(3) so that "by any means authorized by this chapter" equates with "in accordance with the provisions of this chapter", as appellants would have to do, would render the latter phrase superfluous. Needless to say, a maxim of statutory construction precludes one part being read so as to render another superfluous. *E.g., United States v. Chen,* 913 F.2d 183, 190 (5th Cir.1990) (quoting *Duke v. University of Texas,* 663 F.2d 522, 526 (5th Cir.1981)) ("It is well established that a statute should be construed so that each of its provisions is given its full effect; interpretations which render parts of a statute inoperative or superfluous are to be avoided.").

The use permitted under § 2517(1) and (2) for unlawfully intercepted information that was received

lawfully by an officer also seems supported by § 2517(5), which states:

> When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications *in the manner authorized herein*, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that *the contents were otherwise intercepted in accordance with the provisions of this chapter.* Such application shall be made as soon as practicable.

18 U.S.C. § 2517(5) (emphasis added). Pursuant to this section, information obtained by an officer conducting an authorized wiretap, even though it is outside the boundaries specified in the authorization order, may be used for the purposes of § 2517(1) and (2), such as for an internal investigation, but may not be used for a more extensive or public purpose (testimony in the type proceeding specified in § 2517(3)), unless first authorized by a judge. This, again, demonstrates the distinction between public disclosure through testimony and disclosure or use for "the proper performance of the official duties" of a law enforcement officer, as in the investigation in this case. Much greater latitude is allowed for the source of information for the latter.

It can be argued that the exception permitted under § 2517(5) (for § 2517(1) and (2) disclosure and use of information outside that permitted by a wiretap order) is the only exception to the Act's proscribing the disclosure or use of information not obtained in accordance with the Act – that it is the exception envisioned by the phrase "any means authorized by this chapter" found in § 2517(1) and (2). But, such a narrow reading of the phrase, as urged by the appellants, would permit using only the contents of interceptions made in accordance with the Act, such as through a judicially-approved wiretap or by consent under certain circumstances. This would mean that officers receiving information about police misconduct, obtained through an illegal interception by a third party, could not use that information to investigate, and possibly prevent, the misconduct, no matter how serious, imminent, or life threatening. This flies in the face of common sense, and would require us to read § 2517(1) and (2) in a manner that compels an absurd result.

The well established maxim against a construction that would clothe Congress with intending such a result does not permit such a reading in this instance. *See, e.g., Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454, 109 S.Ct. 2558, 2566, 105 L.Ed.2d 377 (1989) (brackets, internal quotation marks, and citation omitted) ("Frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe

that the legislator intended to include the particular act."); *Ecee, Inc. v. Federal Energy Regulatory Comm'n*, 611 F.2d 554, 564 (5th Cir.1980) (brackets, internal quotation marks, and citation omitted) ("A construction of a statute leading to unjust or absurd consequences should be avoided").

Because of the lack of clarity in § 2517, we look to the Act's legislative history. *E.g., Toibb v. Radloff*, 501 U.S. 157, 162, 111 S.Ct. 2197, 2200, 115 L.Ed.2d 145 (1991) (internal quotation marks omitted) ("Where . . . the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear."); *Stone v. Caplan (Matter of Stone)*, 10 F.3d 285, 289-90 (5th Cir.1994) (court can consider legislative history in interpreting ambiguous statute). And, as stated earlier, that the phrase in question cannot be read as narrowly as appellants urge is covered expressly by that history:

> Neither paragraphs (1) nor (2) [of § 2517] are limited to evidence *intercepted in accordance with the provisions of the proposed chapter*, since in certain limited situations *disclosure and use of illegally intercepted communications would be appropriate* to the proper performance of the officers' duties. For example, such use and disclosure would be necessary in the investigation and prosecution of an illegal wiretapper himself.

S.Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2188 (emphasis added); *see also United States v. Liddy*, 354 F.Supp. 217, 221 (D.C.D.C.1973) (citing

legislative history, and rejecting contention that absolutely no disclosure is permitted by the Act, because it would prevent persons who have allegedly violated the Act from being prosecuted; Congress did not intend for [the] Act "to be self-emasculating"), *aff'd*, 509 F.2d 428 (D.C.Cir.1974), *cert. denied*, 420 U.S. 911, 95 S.Ct. 833, 42 L.Ed.2d 842 (1975).[34] No more need be said; the facts at

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[34] In dictum, the Second Circuit has described § 2517(1) and (2) in a manner consistent with our reading and the legislative history, focusing on whether the officers gained knowledge of the contents of the intercepted communications lawfully, rather than on whether the interception was lawful:

> Subsection 1 [of § 2517] permits "any investigative or law enforcement officer" *who has lawfully obtained knowledge of the contents of any intercepted communication* to "*disclose* such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate" in the performance of their official duties. Subsection 2 authorizes investigative or law enforcement personnel *who have lawfully obtained knowledge of any intercepted communications* "to use such contents to the extent such use is appropriate to the proper performance of [their] official duties."

Application of Newsday, Inc., 895 F.2d 74, 76 (2d Cir.) (emphasis added), *cert. denied*, 496 U.S. 931, 110 S.Ct. 2631, 110 L.Ed.2d 651 (1990). *Cf. United States v. Vest*, 813 F.2d 477 (1st Cir.1987), discussed earlier in part II.B.1., where the court held that, pursuant to § 2515, illegally intercepted information was inadmissible as evidence, even though the government played no role in the interception.

> [A]n invasion of privacy is not over when an interception occurs, but is compounded by disclosure in court or elsewhere. The impact of this second invasion is not lessened by the circumstance that the disclosing party (here, the government) is merely the

hand present one of the "limited situations" forecast by the legislative history for allowing use of illegally intercepted information.[35] *See also United States v. Ross*, 713 F.2d 389, 392 (8th Cir.1983) (quoting *Roberts v. United States*, 445 U.S. 552, 558, 100 S.Ct. 1358, 1363, 63 L.Ed.2d 622 (1980)) ("the limitations Congress placed on the willful disclosure of wire communications in subsection 2511(1)(c) should not be examined in a vacuum. As the Supreme Court has emphasized, a 'deeply rooted social obligation' exists for citizens to report felonies to the authorities").[36]

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innocent recipient of a communication illegally intercepted by the guilty interceptor.

Id. at 481. *Vest* is inapposite; it did not consider or address disclosure or use authorized by § 2517(1) or (2). Instead, as noted, it concerned § 2515 (the statutory exclusionary rule), and involved a criminal prosecution for perjury, in which the government sought to introduce in evidence a conversation recorded by a third party without the defendant's knowledge. The court "decline[d] to read into section 2515 an exception permitting the introduction in evidence of an illegally-intercepted communication by an innocent recipient thereof". 813 F.2d at 481.

[35] *But see* James G. Carr, *The Law of Electronic Surveillance*, § 7.4(b), at 7-47 (1993) ("use of illegally obtained information should be limited to [investigation and prosecution of persons who violate the Act] and not expanded into other investigatory activities or purposes, despite the suggestion in Senate Report 1097 to the contrary").

[36] *Cf. Rodgers v. Wood*, 910 F.2d 444 (7th Cir.1990), in which police officers, executing a search warrant at a building, used the owner's telephone. The owner taped all calls made on that telephone, including an officer's to a reporter, advising about the warrant before it was executed (a felony under Wisconsin law). After the owner's lawyer disclosed the intercepted

We hold that, under the unique facts and circumstances of this case – including that the appellees did not participate in or procure the interception, and obtained knowledge of the intercepted communications from third parties who made serious charges that an officer was engaged in administrative and criminal misconduct – the appellees' disclosure and use of the information from the intercepted communications, in conducting a preliminary internal affairs investigation, was authorized by § 2517(1) and (2).[37] We caution that this holding is narrow, limited to the facts of this case. It should not be read as undermining the salutary purpose of the Act, or as providing a means of sidestepping it.

C.

The City's appeal had its genesis when, approximately two years after this action was filed, Vines, who had been terminated as Chief of Police, moved to disqualify the City Attorney as his counsel, and requested the appointment of independent counsel, to be paid by the City. He claimed a conflict of interest because the City

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contents to the police department's internal affairs division and others, the officers sued the lawyer, and were awarded damages. The Seventh Circuit rejected a claim to a common law privilege for statements to police officers in the course of investigation of criminal activity. (Needless to say, § 2517 was not in issue; the suit was not against the police.)

[37] Our holding precludes reaching the appellants' state law claims, which are premised on the same facts and circumstances as their federal claims. They requested reinstatement of the state claims only if the summary judgment on the federal claims was reversed.

Attorney was involved in presenting charges which led to Vines' prosecution for misdemeanor perjury in an unrelated matter.

At a hearing on the motion, Vines stated that he had presented a claim for damages to the City, related to his discharge, and intended to file a civil action if the matter was not resolved. The district court granted the motion, finding that the past relationship of Vines and the City Attorney's office, as it related to both the perjury charge and Vines' damages claim, constituted a sufficient basis for finding a conflict.

The City moved for reconsideration, pointing out that, subsequent to filing his disqualification motion, Vines was acquitted of perjury, and asserting that the order to pay attorney's fees exceeded the scope of the court's authority. The court denied the reconsideration motion, stating:

> The conflict arises from the City Attorney's attempt to represent Vines in this action while simultaneously taking an adverse position to that of Vines in a criminal proceeding, and in Vines' claim for damages against the City. In such a situation, an attorney's loyalty to the client is called into question.

We review the rulings only for abuse of discretion.[38] *See In re Dresser Industries, Inc.*, 972 F.2d 540, 542 n. 4 (5th Cir.1992) (citing *In re Gopman*, 531 F.2d 262 (5th Cir.1976)).

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[38] In July 1991, our court denied the City's petition for a writ of mandamus concerning the disqualification order. Although the parties have not addressed whether that order is final, we note that a judgment determining liability for attorney's fees, but not awarding a specified amount of fees, is interlocutory in nature. *See Echols v. Parker*, 909 F.2d 795, 798 (5th

The City claims first that Vines failed to establish a conflict of interest. At the conclusion of the hearing, the court stated that the relationships between Vines and the City "certainly offer the greatest potential for conflict of interest that can be imagined", and held that disqualification was necessary "in order to ensure that Vines receives effective and impartial representation". The court was well within its discretion.

The City asserts next that the district court should not have reached the issue of attorney's fees. We disagree. As the district court noted in its order denying the reconsideration motion, it did not order the City "to pay a certain fee to any particular attorney, but has only ordered that the City will be responsible for the necessary and reasonable fee". This was not an abuse of discretion.

Finally, the City contends, in the alternative, that the disqualification should apply only to the extent that Vines is sued in his individual capacity, asserting that a suit against Vines in his official capacity is a suit against the City, and that to prohibit the City Attorney from representing Vines in that capacity effectively denies the City its right to represent itself. Responding to a similar

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Cir.1990); *Deloach v. Delchamps, Inc.*, 897 F.2d 815, 826 (5th Cir.1990); *Hay v. City of Irving, Tex.*, 893 F.2d 796, 800 (5th Cir.1990). But here, the City is appealing the disqualification of the City Attorney; it apparently does not contest its paying reasonable attorney's fees if there is a conflict of interest. In fact, it concedes that Texas law provides a statutory basis for a municipality to employ outside legal counsel to defend a lawsuit against an employee when there is a conflict (or potential conflict) of interest between the municipality and employee.

contention in its order denying reconsideration, the district court stated that "[t]he obligation to pay the fees applies to the representation of Vines in both his individual and official capacities". For obvious reasons, because the court found a conflict of interest, we do not consider this ancillary ruling an abuse of discretion.[39]

III.

For the foregoing reasons, the judgment and the ruling on counsel for Vines are

AFFIRMED.

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[39] We note that, on appeal, and contrary to the concerns expressed by the City, Vines adopted the City's brief on the merits. He briefed only the separate counsel issue.

APPENDIX R

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10360

JAN FORSYTH; RICHARD KIRKS,

Plaintiffs-Appellees-Cross-Appellants,

versus

DALLAS TX CITY OF, ET AL,

Defendants,

DALLAS TX CITY OF; WILLARD ROLLINS;
RICHARD HATLER,

Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Texas, Dallas

(Corrected)
(Filed Mar. 31, 1997)

Before POLITZ, Chief Judge, JONES and BARKSDALE, Circuit Judges.

BY THE COURT:

Appellants' motions for rehearing and rehearing en banc are denied. The order of this court entered on November 15, 1996 remains in force and in effect. This order is then issued as and for the mandate.

APPENDIX S

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10360

D.C. Docket No. 3:91-CV-344
3:90-CV-1118-T

JAN FORSYTH; RICHARD KIRKS

Plaintiffs-Appellees-Cross-Appellants

v.

DALLAS TX CITY OF, ET AL

Defendants

DALLAS TX CITY OF; WILLARD ROLLINS;
RICHARD HATLER

Defendants-Appellants-Cross-Appellees

Appeal from the United States District Court
for the Northern District of Texas, Dallas

Before POLITZ, Chief Judge, JONES and BARKSDALE, Circuit Judges.

JUDGMENT

(Corrected)
(Filed Mar. 31, 1997)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the district court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant cross-appellee pay to plaintiffs-appellees cross-appellants the costs on appeal to be taxed by the Clerk of this Court.

IT IS FURTHER ORDERED that the issue of attorneys' fees is remanded to the district court.

ISSUED AS MANDATE: MAR 31 1997

APPENDIX T

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The following constitutional provisions and statutes are involved in this case:

1. United States Constitution, amendment I:

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, amendment XIV, §1:

   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 United States Code §1983:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable

exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. 42 U.S.C. § 1988 (1994):

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 4, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this

title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

5. Tex. Gov't Code Ann. § 554.002, Texas Whistleblower Act: Retaliation Prohibited for Reporting a Violation of Law: (West 1994) (amended 1995):

A state agency or local government may not suspend or terminate the employment of or discriminate against a public employee who in good faith reports a violation of law to an appropriate law enforcement authority.

6. Tex. Gov't Code Ann. § 554.002, Texas Whistleblower Act: Retaliation Prohibited for Reporting a Violation of Law (West Supp. 1997) (amending Tex. Gov't Code Ann. § 554.002 (West 1994)):

(a) A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.

(b) In this section, a report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to:

(1) regulate under or enforce the law alleged to be violated in the report; or

(2) investigate or prosecute a violation of criminal law.

7. Tex. Gov't Code Ann. § 554.001, Texas Whistleblower Act: Definitions (West Supp. 1997):

In this chapter:

. . .

(3) "Personnel action" means an action that affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation.

. . .

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD KIRKS and JAN FORSYTH,	§	
Plaintiffs,	§	CIVIL ACTION
	§	NO. CA3-90-1118-T
vs.	§	
CITY OF DALLAS, TEXAS, et al.,	§	
Defendants.	§	

NOTICE OF APPEAL

(Filed Apr. 17, 1995)

Notice is hereby given that the City of Dallas, Willard Rollins, and Richard Hatler, named as Defendants above, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the district court's Final Judgment which was filed on January 31, 1995, and entered on February 2, 1995; the district court's Order Declaring Moot Renewed Motion for Judgment as a Matter Of Law and Denying in Part Amended Renewed Motion for Judgment as a Matter of Law and Denying in Part Alternative Motion for New Trial which was filed on March 31, 1995, and entered on April 3, 1995; the district court's Order Granting in Part Plaintiffs' Motion to Amend Judgment and Granting in Part Plaintiffs' Motion for Attorneys' Fees and Costs which was filed on March 31, 1995, and entered on April 3, 1995; and the district court's Amended Final Judgment which was filed on March 31, 1995, and entered on April 3, 1995.

Respectfully submitted,

CITY ATTORNEY OF THE CITY OF DALLAS, TEXAS

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By /s/ Sam A. Lindsay
SAM A. LINDSAY

CERTIFICATE OF SERVICE

A copy of the foregoing document was delivered to Mr. Douglas R. Larson, counsel for Plaintiffs, 410 West Main, Suite 101, Mesquite, Texas 75419-4230, and Mr. Bill Boyd, Boyd Veigel, P.C., counsel for Defendant Mack Vines, P.O. Box 1179, McKinney, Texas 75069, by certified mail, return receipt requested, on this 17th day of April, 1995.

/s/ Sam A. Lindsay
SAM A. LINDSAY

APPENDIX V

JURY INSTRUCTION NO. 6:
QUALIFIED IMMUNITY

Public officials who act within the scope of their discretionary authority and in the course of their official responsibilities are entitled to the defense of qualified immunity, which shields them from suit as well as liability for civil damages, where their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Davis v. Scherer*, 468 U.S. 183, 191, *quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *See also, Malley v. Briggs*, 475 U.S. 335 (1986); *Pierson v. Ray*, 386 U.S. 547 (1967). Police officers are specifically entitled to assert this qualified immunity defense. *Gassner v. City of Garland*, 864 F.2d 394 (5th Cir. 1989); *Trejo v. Perez*, 693 F.2d 482 (5th Cir. 1982).

A police officer is entitled to the defense of qualified immunity if he can establish that his conduct was lawful in light of clearly established law and the information he possessed. *Anderson v. Creighton*, 483 U.S. 635 (1987). If reasonable public officials could differ on the lawfulness of the officer's actions, the officer is entitled to qualified immunity and you must find for the officer. *Briggs*, 475 U.S. at 341. You are further instructed that, even if the officer's conduct actually violates the Plaintiffs' constitutional rights, the officer is entitled to qualified immunity if his conduct was objectively reasonable. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990). Thus, the ultimate question regarding the issue of qualified immunity in this case is whether a reasonable police officer could have believed that the transfer was lawful in

light of clearly established law and the information he possessed at the time he decided to transfer Plaintiffs. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

Police officers can be expected to have limited knowledge regarding the fundamental rights of citizens. Lawlessness will not be allowed to pervade law enforcement officers; however, in holding such personnel to an objective standard of behavior, our judgment must be tempered with reason. If we are to measure official action against an objective standard, it must be a standard which speaks to what a reasonable officer should or should not know about the law. A police officer is not expected to adhere to a legal scholar's expertise in constitutional law. *Saldana*, 684 F.2d at 1165 (5th Cir. 1982).

JURY INTERROGATORY NO. 1:

Did Plaintiffs prove by a preponderance of the credible evidence that a reasonable police officer could not have concluded that the conduct of Defendant police officials Mack Vines, Willard Rollins, and Richard Hatler was proper with respect to the transfer of Plaintiffs?

Answer "Plaintiffs did prove" or "Plaintiffs did not prove."

ANSWER:

Mack Vines: _____

Willard Rollins: _____

Richard Hatler: _____

APPENDIX W

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAN FORSYTH and
RICHARD KIRKS,

Plaintiffs,

v.

CITY OF DALLAS,
MACK VINES,
WILLARD ROLLINS, and
RICHARD HATLER,

Defendants.

No. 3:90-CV-1118-T

(Filed Jan. 18, 1995)

COURT'S CHARGE TO THE JURY

Section 1

MEMBERS OF THE JURY:

Now that you have heard the evidence, it is my duty to instruct you as to the law applicable to this case. It is your duty as jurors to follow the law as stated in this charge and to apply the rules of law so given to the facts as you find them from the evidence in the case.

The following instructions contain the law that you should apply in answering certain questions of fact in the case, and I will also read those questions to you.

General Instructions

The burden is upon Plaintiffs to prove every essential element of their claims by a preponderance of the evidence, unless I instruct you otherwise.

"Preponderance of the evidence" means the greater weight and degree of credible evidence admitted in this case. It is that evidence which, when considered and compared with that opposed to it, has more convincing force and produces in your minds an assurance that what is sought to be proved is more likely true than not true. In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them. If the proof shows that Plaintiffs have established the essential elements as to any claim by a preponderance of the evidence, you should find for Plaintiffs on that claim or claims. If the proof should fail to establish by a preponderance of the evidence an essential element of any claim of Plaintiffs, you should find for Defendants as to that claim.

Plaintiffs have alleged more than one claim as they are entitled to do. Under the law, plaintiffs are required to state separately in their Complaint each basis upon which they believe they are entitled to recover against a defendant. You should consider separately each claim of Plaintiffs since each claim is based on different evidence and different legal principles. The fact that you may find for or against Plaintiffs on one or more of their claims does not mean that you should find for or against Plaintiffs on

all of their claims, since each claim must be separately considered and decided by you. You may find, based on a preponderance of the evidence, that Plaintiffs have established the essential elements of some, all, or none of their claims.

In the final analysis, it is your responsibility to make your own independent decision as to the ultimate facts in this case and to reach that opinion based on all of the evidence, regardless of the source from which it came.

Generally speaking, there are two types of evidence which you may consider in properly finding the truth as to the facts in this case. One is direct evidence – such as testimony of any eye witness. The other is indirect or circumstantial evidence – the proof of a chain of circumstances which points to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

While you should consider only the evidence in the case, you are permitted to draw reasonable inferences and deductions from the evidence. The word "infer," or the expression "to draw an inference," means to find that a fact exists based on proof of another fact. An inference may be drawn only if it is reasonable and logical, not if it is speculative. Therefore, in deciding whether to draw an inference, you must look and consider all the facts in the light of reason, common sense, and experience. After you have done that, the question whether to draw a particular inference is for you to decide.

Definitions and Explanations

You will be asked to consider certain legal terms and propositions of law in your determination as to the facts of this case, so at the outset, I will give you some definitions and explanations.

When words are used in this charge in a sense which varies from the meaning commonly understood and you are given a legal definition, you are bound to accept the definition in these instructions in place of any other meaning.

Municipal Corporations

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A municipal corporation is entitled to the same fair trial at your hands as a private individual. All persons, including municipal corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

Adverse Employment Actions

Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands.

Intent

In determining whether a defendant acted with the requisite knowledge, or whether a defendant acted recklessly, you should remember that while witnesses may

see and hear and so be able to give direct evidence of what a person does or fails to do, there is no way of looking into a person's mind. Therefore, you have to depend on what was done and what the people involved said was in their minds and your belief or disbelief with respect to those facts. It is entirely up to you what facts to find from the evidence.

Intentional

An act is intentional if it is done knowingly, that is if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason.

Recklessness

An act is reckless if done in conscious disregard of its known probable consequences. Reckless misconduct requires a conscious choice of a course of action, either with the knowledge of the serious consequences to others or with knowledge of facts which would disclose this danger to any reasonable person.

Specific Instructions

Now, beginning with Section 2 of this charge, I will give you instructions specific to each claim you are to consider. You must heed these specific instructions as well as the foregoing instructions, and the instructions which I will give you after the argument of the attorneys, when you deliberate upon your answers to the questions asked of you in this charge, or to such of them as may be

necessary, according to the directions given in connection with the questions.

Section 2

Federal Law Claim

Plaintiffs, in their first claim, allege that Defendants violated federal law by retaliating against them because of their exercise of rights guaranteed them by the First Amendment to the United States Constitution. The law to be applied in your consideration of this claim is the federal civil rights law which provides a remedy for persons who have been deprived of their constitutional rights under color of state law.

Title 42, section 1983 of the United States code provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

You are instructed that, under this law, retaliation against a person because that person exercised a Constitutional right is the equivalent of depriving the person of the right.

Plaintiffs allege that Defendants intentionally, or with reckless disregard of Plaintiffs' rights, retaliated against

them because of Plaintiffs' exercise of their right to freedom of speech and right to petition the Government. The First Amendment to the Constitution of the United States provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of people . . . to petition the Government for a redress of grievances.

Persons who have been retaliated against for exercising a Constitutional right may recover their actual damages and may be awarded exemplary damages.

Elements of a Section 1983 Claim

To establish their claim under section 1983, Plaintiffs must establish, by a preponderance of the evidence, each of the following three elements:

First: That the conduct complained of was committed by one or more Defendants, acting under color of state law;

Second: That the acts were committed intentionally or with reckless disregard of the rights of Plaintiffs, and this conduct deprived Plaintiffs of their rights of freedom of speech or to petition the Government for a redress of grievances, as secured by the Constitution and laws of the United States; and

Third: That Defendants' acts were the proximate cause of injuries and consequent damages sustained by Plaintiffs.

The first element of Plaintiffs' claim is that Defendants acted under color of state law. State or local officials act "under color" of the authority of the state when they act within the limits of their lawful authority. However, they also act "under color" of the authority of the state when they act without lawful authority or beyond the bounds of their lawful authority if their acts are done while the officials are purporting or pretending to act in the performance of their official duties. An official acts "under color" of the state authority if he abuses or misuses a power that he possesses only because he is an official.

The conduct complained of by Plaintiffs is the transfer of Plaintiffs from the intelligence division of the Dallas Police Department to the patrol division. I instruct you that, since the individual defendants were officials of the state of Texas at the time of the acts in question, they were acting under color of state law. In other words, the first required element is satisfied.

The second element of Plaintiffs' claim which must be proved by a preponderance of the evidence is that Defendants' conduct in transferring them was an adverse employment action taken against them in retaliation for their exercise of rights secured to them by the First Amendment of the United States Constitution. Therefore, to establish this second element, Plaintiffs must show, by a preponderance of the evidence, the following factors: (1) that the transfer was, in fact, an adverse employment action; (2) that Plaintiffs' activities were protected under the First Amendment; (3) that the transfer was made in retaliation for their exercise of either their right of free speech or their exercise of their right to petition the

Government for redress of grievances, or both, and (4) that, in performing the acts alleged, Defendants acted intentionally or with reckless disregard for the rights of Plaintiffs. Plaintiffs must establish, by a preponderance of the evidence, that all of these factors are present in order to satisfy the second required element.

Plaintiffs claim that their transfer to patrol duty was in retaliation for their exercise of their right to petition the Government for redress of grievances. The right to petition includes Plaintiffs' right to bring a lawsuit against their superiors and their employer, the City of Dallas.

Plaintiffs also claim that Defendants deprived them of their right to freedom of speech in that Defendants denied them their right to speak out to the press regarding alleged illegal activities of the individual defendants.

Plaintiffs must establish, by a preponderance of the evidence, that the exercise of either or both of these rights was the substantial or motivating factor in Defendants' decision to transfer them to patrol duty. Plaintiffs' protected activity was a substantial or motivating factor in Defendants' decision to take an adverse employment action against them if it played a substantial part in the actual decision to take action against Plaintiffs.

In determining whether Defendants intentionally violated Plaintiffs' First Amendment rights, you must determine whether Plaintiffs' activities are protected. Plaintiffs, as public employees, have a right to exercise their rights only to the extent that they do not unduly interfere with the duties and responsibilities of their employment. In determining whether Plaintiffs' activities

in this case were protected activities under the First Amendment, you must balance Plaintiffs' First Amendment interests against Defendants' interest in promoting the efficiency of the public service it performs through its employees. Therefore, if you find under all the circumstances presented, that a reasonable public employer could not have concluded that Plaintiffs' First Amendment activities unduly interfered with the duties and responsibilities of Plaintiffs' employment, you must find that Plaintiffs' activities were protected under the First Amendment.

If you determine that Plaintiffs' activities were protected under the First Amendment, you must next determine the reason or reasons for Defendants' decision to transfer Plaintiffs. Defendants may have transferred Plaintiffs for several reasons. If so, then you must determine whether one of those reasons was that Plaintiffs filed a lawsuit against their superior officers. Similarly, you must determine whether one of those reasons was that Plaintiffs were reporting to the press alleged illegal conduct of their superior officers. If it was one or both of those reasons, then you must determine whether either or both played a substantial part in the actual decision to transfer Plaintiffs. To constitute a substantial or motivating reason, the reason must have been such that it made a difference or influenced Defendants' decision.

The fact that an employee of a municipality deprived a plaintiff of a federal right is not alone a sufficient basis for holding the municipality liable to the plaintiff. Before the municipality may be held liable for the action of an employee, the plaintiff must establish by a preponderance of the evidence that the action of the employee

taken against the plaintiff in retaliation for the exercise of his federal right was the result of an "official policy" of the municipality or a governmental custom, even though such a custom has not received formal approval through the body's official decision-making channels.

"Official policy" is defined as: (1) A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by a municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or (2) A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

Thus, before you can hold the municipality liable for a decision made by an employee, you must be convinced that the acts in question were officially sanctioned or ordered by the municipality. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. In this case, the decision to transfer Richard Kirks and Jan Forsyth made by Chiefs Hatler, Rollins, and Vines was reviewable by the city manager, city council, or both. Because the decision was reviewable, Chiefs Hatler, Rollins, and Vines did not possess final authority to establish municipal policy regarding the transfer.

This is not to say that the actions of Chiefs Hatler, Rollins, and Vines cannot be considered by you, along with other evidence in the case, in making your determination as to whether an official policy existed. It merely means that Plaintiffs cannot rely solely on the decision made by these officials to determine whether an official policy exists. Whether an official policy exists is a question of fact for you to determine from all the evidence in the case.

The city council or the policymaking body may establish policy by direct orders, by ratifying a subordinate's decision and the stated basis for it, or by establishing a policy for municipal employees that, when followed by those employees, results in the injury.

There is no requirement, however, that the action was taken pursuant to a long-standing or regularly applied policy of the municipality. A government frequently chooses a course of action tailored to a particular situation. Even if you determine that the particular policy was established for a single occasion, you may still find that it represented an official policy of the municipality, provided that a deliberate choice to follow a course of action was made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Please answer Question No. 1.

Question No. 1

Do you find from a preponderance of the evidence that Defendants' transfer of Plaintiffs from the intelligence division to the patrol division constituted an adverse employment action taken against Plaintiffs?

Answer "Yes" or "No."

Answer: yes .

If you have answered this question "Yes," then answer the next question. Otherwise, your deliberations are finished.

Question No. 2

Do you find from a preponderance of the evidence that Plaintiffs' filing of a lawsuit against their superior officers was a substantial or motivating factor in Defendants' decision to transfer them to patrol duty?

Answer "Yes" or "No" as to each defendant listed below.

Mack Vines No

Willard Rollins No

Richard Hatler No

Please answer the next question.

Question No. 3

Do you find from a preponderance of the evidence that Plaintiffs' reporting to the press of alleged illegal conduct by their superior officers was a substantial or motivating factor in Defendants' decision to transfer them to patrol duty?

Answer "Yes" or "No" as to each defendant listed below.

Mack Vines No

Willard Rollins Yes

Richard Hatler Yes

If you have answered "Yes" any defendant in to either Question No. 2 or Question No. 3, then answer the next question. Otherwise, proceed to the instructions on Plaintiffs' State Law Claim.

Question No. 4

Do you find from a preponderance of the evidence that Defendant City of Dallas, at the time in question, had an official policy of permitting retaliation against police officers who accused superior officers of wrongdoing or who filed lawsuits against their superior officers?

Answer "Yes" or "No."

Answer: Yes .

Please proceed to the instructions on Plaintiffs' State Law Claim.

State Law Claim

In their second claim, Plaintiffs allege that Defendants violated Texas state law by retaliating against them for reporting in good faith that their superior officers had violated both federal and state laws regarding wiretaps. Plaintiffs claim that Defendants retaliated against them by transferring them from the intelligence division to patrol duty.

Texas has enacted what is commonly referred to as the Texas Whistleblower Act. This law provides as follows, in pertinent part:

> A state or local governmental body may not suspend or terminate the employment of, or otherwise discriminate against, a public employee who reports a violation of law to an appropriate law enforcement authority if the employee report is made in good faith.

This Act protects public employees who in good faith believe they are reporting a violation of law, regardless of whether their belief is correct.

Public employees who have been retaliated against in violation of the Whistleblower Act may recover their actual damages and may be awarded exemplary damages.

Elements of a Whistleblower Claim

To establish their claim under the Whistleblower Act, Plaintiffs must establish, by a preponderance of the evidence, each of the following elements:

First: That Plaintiffs reported alleged violations of law to an appropriate law enforcement authority;

Second: That Plaintiffs made the report in good faith;

Third: That Defendants took an adverse employment action against Plaintiffs because Plaintiffs had made the report; and

Fourth: That Defendants' retaliatory act was the proximate cause of injuries and consequent damages sustained by Plaintiffs.

An "appropriate law enforcement authority" within meaning of Whistleblower Act, must be an authority that has the power and duty to order a halt to or to change the matter reported, or the power to arrest, prosecute or otherwise discipline on account of the alleged violation being reported. This includes reports made in good faith to city departments or officials with the power and duty to inquire into the lawfulness of the questioned conduct.

You are instructed that "good faith" means honesty in fact in the conduct concerned. You are to consider Plaintiffs' actual belief as long as that belief was not unreasonable.

Question No. 5

Was the report of Richard Kirks and Jan Forsyth concerning an alleged violation of law by Mack Vines, Willard Rollins, and Dwight Walker which was made to Kenneth Lybrand or their superior officers within the Dallas Police Department the reason or one of the reasons that Plaintiffs were transferred from the intelligence division to the patrol division?

Answer "Yes" or "No."

Answer: yes .

If you have answered this question "Yes," then answer the next question.

If you have answered this question "No" and you have answered "Yes" as to any defendant in your answers to Questions No. 2 or No. 3, proceed to the instructions on Compensatory Damages.

If you have answered "No" to this question and you have answered "No" as to all defendants in your answers to Questions No. 2 or No. 3, your deliberations are finished.

Question No. 6

Was that report of Richard Kirks and Jan Forsyth concerning an alleged violation of law by Mack Vines, Willard Rollins, and Dwight Walker which was made to Kenneth Lybrand or their superior officers within the Dallas Police Department made in good faith?

Answer "Yes" or "No."

Answer: yes .

If you have answered this question "Yes," then proceed to the instructions on Compensatory Damages.

If you have answered this question "No" and you have answered "Yes" as to any defendant in your

answers to Questions No. 2 or No. 3, proceed to the instructions on Compensatory Damages.

If you have answered "No" to this question and you have answered "No" as to all defendants in your answers to Questions No. 2 or No. 3, your deliberations are finished.

Compensatory Damages

If you find that Plaintiffs have carried their burden of proving by a preponderance of the evidence either their Federal Law Claim or their State Law Claim, or both, you must then consider the issue of damages.

However, just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not any defendant should be held liable or whether or not any plaintiff should be awarded any damages.

Actual or Compensatory Damages

If you return a verdict for Plaintiffs, then you must award them such sum of money as you believe will fairly and justly compensate them for any injury you believe he or she actually sustained as a direct consequence of the conduct of Defendants.

Any award for compensatory damages must only be for any actual damages for those injuries which you find that Plaintiffs have proven by a preponderance of the evidence. Moreover, you shall award actual damages only for those injuries which you find Plaintiffs have proven by a preponderance of evidence to have been the direct

result of conduct for which you have found Defendants liable. That is, you may not simply award actual damages for any injury suffered by Plaintiffs – you must award actual damages only for those injuries that are a direct result of actions by Defendants and that are a direct result of conduct by Defendants which violated the law, if any such you have found.

Actual damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence.

Nominal damages may be awarded. Nominal damages are damages in a nominal, or minimal amount awarded to a plaintiff who has established a violation of his or her rights, but who has not suffered any actual damages.

Causation and Damages

I have said that you may award damages only for those injuries which you find Plaintiffs have proven by a preponderance of evidence to have been the direct result of conduct by the Defendants. You must distinguish between, on the one hand, the existence of a violation of Plaintiffs' rights and, on the other hand, the existence of injuries naturally resulting from that violation. Thus, even if you find that Defendants deprived Plaintiffs of a right under the law, you must determine whether Plaintiffs have proven by a preponderance of evidence that the deprivation caused the damages that they claim to have suffered.

Double Recovery and Compensatory Damages

In this case, Plaintiffs claim that Defendants violated several of their rights by the transfer. If you find that Defendants did in fact violate more than one of Plaintiffs' rights, you must remember, in calculating the damages, that Plaintiffs are entitled to be compensated only for injuries they actually suffered. Thus, if Defendants violated more than one of Plaintiffs' rights, but the resulting injury was no greater than it would have been had Defendants violated one of those rights, you should award an amount of compensatory damages no greater than you would award if Defendants had violated only one of Plaintiffs' rights. If, on the other hand, Defendants violated more than one of Plaintiffs' rights and you can identify separate injuries resulting from the separate violations, you should award an amount of compensatory damages equal to the total of the damages you believe will fairly and justly compensate Plaintiffs for the separate injuries they have suffered.

Compensatory damages can be inferred from the circumstances presented to you by the evidence, or they can be proven by testimony going solely to the issue of damages.

In the determination of the amount of the award it will often be impossible for you to arrive at a precise award. For example, compensatory damages are available for emotional distress and humiliation. It is difficult to arrive at a precise evaluation of actual damage for emotional harm. Nonetheless, it is necessary to arrive at a reasonable award that is supported by the evidence

offered by Plaintiffs. There must have been evidence presented at trial to support your award of general compensatory damages, for an award cannot be based on speculation or sympathy on your part.

If Plaintiffs prove that the injury they suffered extends into the future because they will be denied future economic opportunities because of Defendants' illegal actions, if any, then the damages you award may compensate them for that loss. In making your calculations, however, you must include a reduction of future damages, as in loss of income, to present value in order to take into account the earning power of the money awarded.

Question No. 7

Answer this question if you have answered "Yes" to Question No. 2, No. 3, or No. 6.

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably and adequately compensate Richard Kirks for damages sustained by him as a result his being transferred to patrol duty?

Answer in dollars and cents, if any. Otherwise, answer "None."

Consider the following elements of damages, if any, and none other:

(a) Mental anguish and suffering in the past.
Answer: $50,000.00 .

(b) Mental anguish and suffering which, in reasonable probability, he will suffer in the future.
Answer: $25,000.00 .

(c) Loss of earnings in the past.
Answer: $80,000.00 .

(d) Loss of earning capacity which, in reasonable probability, he will suffer in the future.
Answer: $675,000.00 .

Please answer the next question.

Question No. 8

Answer this question if you have answered "Yes" to Question No. 2, No. 3, or No. 6.

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably and adequately compensate Jan Forsyth for damages sustained by her as a result her being transferred to patrol duty?

Answer in dollars and cents, if any. Otherwise, answer "None."

Consider the following elements of damages, if any, and none other:

(a) Mental anguish and suffering in the past.
Answer: $75,000.00 .

(b) Mental anguish and suffering which, in reasonable probability, she will suffer in the future.
Answer: $25,000.00 .

Please proceed to the instructions on Exemplary Damages.

Exemplary Damages

If you return a verdict for Plaintiffs and you award Plaintiffs actual or compensatory damages, then you may decide to make them a separate and additional award of exemplary or punitive damages. You may award exemplary damages to Plaintiffs even in the absence of actual damages. You may award exemplary damages if you believe that Defendants should be punished for conduct that was motivated by an evil motive or intent, or that involves reckless or callous disregard or indifference to Plaintiffs' rights. A showing of personal animosity by Defendants is not a prerequisite. Personal animosity means a strong dislike of Plaintiffs as individuals.

Plaintiffs are not entitled to exemplary damages as a matter of right. You must make a judgment about each of the defendants' conduct. To make such a judgment it is important to keep in mind the reason for awarding exemplary damages: to punish a defendant for malicious conduct against a plaintiff or callous disregard or indifference to a plaintiff's rights and to deter such conduct in the future by the defendant or others. Thus, you should consider whether the award of exemplary damages will accomplish this dual purpose of punishment and deterrence.

Proceed to Question No. 9.

Question No. 9

Answer this question only if you have answered "Yes" as to any defendant in Question No. 2 or Question No. 3.

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence that Plaintiffs should be awarded against Defendants as exemplary damages for the conduct you have found in your answer to Question No. 2 or Question No. 3?

Answer this question only as to any defendant for whom you answered "Yes" in either Question No. 2 or Question No. 3.

Answer in dollars and cents, if any. Otherwise, answer "None."

Mack Vines:	$ None .
Willard Rollins:	$ 125,000.00 .
Richard Hatler:	$ 125,000.00 .

Proceed to the next question.

Question No. 10

Answer this question only if you have answered "Yes" to Question No. 4. Otherwise, proceed to Question No. 11.

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence that Plaintiffs should be awarded against Defendant City of Dallas as exemplary damages for the conduct you have found in your answer to Question No. 2 or Question No. 3?

Answer in dollars and cents, if any. Otherwise, answer "None."

City of Dallas: $125,000.00 .

Proceed to the next question.

Question No. 11

Answer this question only if you have answered "Yes" to Question No. 6. Otherwise, your deliberation are finished.

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence that Plaintiffs should be awarded against Defendant City of Dallas as exemplary damages for violation of the Texas Whistleblower Act?

Answer in dollars and cents, if any. Otherwise, answer "None."

City of Dallas: $750,000.00 .

Question No. 11 is the last question.

At this time, counsel will have the opportunity to make their final arguments.

After the arguments, I will give you some additional instructions, after which you will retire to commence your deliberations.

* * *

Section 3

MEMBERS OF THE JURY:

In arriving at your verdict, it is your duty to follow the rules of law which I give to you and to find the facts of this case from the evidence introduced at the trial and in accordance with these rules of law.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in these instructions, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence admitted before you in the case.

In deciding the facts of this case, you must not be swayed by sympathy, resentment, bias or prejudice as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. The parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

Also, the fact that I have given you instructions on the law of damages and on other matters does not in any way suggest that I believe that damages are necessarily due in this case. Whether a party is entitled to recover any damages is solely a question for you to decide.

You should not consider or be influenced by the fact that during the trial of this case, counsel have made objections to the testimony or to exhibits, as it is their duty to do so, and it is my duty to rule on those objections in accordance with the law. You should not and you may not draw any inferences from such objections or from my rulings on the objections and references about facts. The objections and my rulings relate only to legal questions that I have to determine. They should not influence your thinking about the facts. Remember, however, that when I sustained an objection to a question, the witness was not allowed to answer it after my ruling. If you heard an answer to a question before my ruling, you are to disregard it. Do not attempt to guess what answer might have been given had I allowed the question to be answered. Also, when I told you to disregard a particular statement, you were told, in effect, to put that statement out of your minds while you go about your deliberations.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is in no way binding upon you.

Now, I have said that you must consider all the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judge of the credibility or believability of all of the witnesses and the weight to be given to their testimony. In weighing the testimony of a witness, you should consider all of the circumstances under which the witness testified – his or her relationship to any party in the case; the witness' interest, if any, in the outcome of the case; the witness' appearance and demeanor while on the witness stand; the witness' opportunity to observe or acquire knowledge concerning the facts about which he or she testified; his or her candor, fairness and intelligence; and the extent to which he or she has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. The testimony of a single witness, which produced in your minds the belief in the likelihood of truth, is sufficient for the proof of any fact, even though a greater number of witnesses may have testified to the contrary, if you believe this witness and have considered all the other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the

discrepancy results from innocent error or intentional falsehood.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Section 4

Deliberations

As you can see, during your deliberations you will answer specific questions about the facts of this case. You must decide the answers to these questions from your determination of the facts based on a fair consideration of all the evidence that you have seen and heard in this trial.

You are the sole and exclusive judges of the facts. Do not speculate on matters which are not in evidence. Keep constantly in mind that it would be a violation of your

sworn duty to base a verdict upon anything but the evidence in the case.

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you.

In the event that you have taken notes during the testimony in this case, you are instructed that you may take your notes with you into the jury room while you deliberate. However, you cannot examine any other juror's notes. Instead, you must confine your examination to your own notes. Further, you must base your decision upon your own recollection of the evidence, aided and assisted by your own notes and the recollection of other jurors.

Remember that you are not professional notetakers, and that a note may be as inaccurate, or more so, than another juror's recollection, aided by notes or not. In other words, you may use the notes only as memory aids.

Additionally, during your deliberations, as you answer the questions asked, you are instructed that:

- Your answers must be based on a preponderance of the evidence. A "Yes" answer requires that you make the proposed finding by a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence.

- Every answer that is required by the charge is important, so no juror should state or consider that any required answer is not important.

- It is important that you answer the questions in the order in which they are presented to you. Your obligation to answer many of the issues depends upon your answers to earlier questions or you may be instructed not to answer some questions depending upon your answers to earlier questions. Therefore, it is important that you start with the first issue and proceed accordingly.

- Your answers to each question must be unanimous. You will not decide an issue by lot or by drawing straws, or by any other method of chance. Do not return a "quotient verdict." A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average.

- Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

If during the course of your deliberations you wish to communicate with the Court, you should do so only in writing by a note handed to the court security officer and signed by the Presiding Juror. During your deliberations

you will set your own work schedule, deciding for yourselves when and how frequently you wish to recess and for how long. Bear in mind that you must not deliberate during any period when one of your number is absent.

Bear in mind also that you are never to reveal to any person – not even the Court – how the jury stands, numerically or otherwise, on the questions before you, until you have reached a unanimous verdict.

When you have answered all the questions to which an answer is required, you have arrived at your verdict. At that time, your Presiding Juror shall sign in the space provided on the verdict form and you will return this charge together with your written answers to the questions. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me.

When you first go to the jury room, please select your Presiding Juror and decide upon a schedule for your deliberations. When you have done so, please give a copy of the schedule to the court security officer.

Do not commence your deliberations until I have sent in to you the charge and the exhibits which have been admitted into evidence.

You may now retire to the jury room.

Signed: January 13, 1995.

/s/ Robert B. Maloney
Robert B. Maloney
Presiding Judge

APPENDIX X

J. FORSYTH – Cross-Examination by Hopkins
IN THE PRESENCE OF THE JURY

Volume II

* * *

[p. 74] out that my supervisors were allowing a dope dealer to monitor our telephone, that part I became very upset with, that nobody took measures to secure the telephone which endangered the public's life, my informants and their family, that's the part that distressed me the most.

Q. So you felt that your superiors were not coming to your aid. Is that one way to put it?

A. That my superiors were placing my informants' lives, DEA and the FBI lives in danger by not telling anybody about that unsecure telephone and letting them continue to work undercover with my partner and I at the farm, endangering people's lives. I felt that was very important for the public to know. And that is how these taped transcripts came to be generated.

Q. And you mentioned that you had diarrhea and other complaints, is that right, other types of distress?

A. Yes.

Q. Okay. And as a result of this distress did you ever see a medical doctor about these complaints?

A. I have seen medical doctors since, but not just from that.

Q. Did you see a medical doctor about this physical and emotional distress in 1989?

A. No.

Q. Did you see him in 1990 or this person –

* * *

[p. 77] Did the damage to your reputation that you claim resulted from the transfer, did that cause you a reduction in your salary?

A. In my salary, I don't believe so, no.

Q. Did this supposed damage to your reputation as a result of the transfer cause you to ever be passed over for promotions to the rank of sergeant?

A. Not in the rank of sergeant, no.

Q. If sergeant was the next higher rank than senior corporal, which you were?

A. I never took a test to make sergeant.

Q. So the jury understands, in the police department promotions are made after having taken a competitive examination. Is that generally correct?

A. Sometimes it occurs that way.

Q. In the – usually isn't it true that promotions to the rank of sergeant are based on scores of promotional tests?

A. (No response.)

Q. Obviously, I'll admit that there may be some exceptions, but the general –

A. I believe that's the way it is.

Q. Okay. Now, you indicated that you did not take the sergeant's exam?

A. No.

Q. Had you ever taken a sergeant's exam prior to your [p. 78] transfer?

A. No.

Q. Did the transfer to patrol affect your ability to receive a retirement pension?

A. Ultimately, it affected my retirement pension, yes, it did.

Q. And in what way would it affect your retirement pension?

A. Well, I wasn't able to stay until I was 50 due to my head injury I sustained and I was forced into retiring early.

Q. So what you're saying is you got transferred to patrol and you were injured while you were in patrol, therefore, that cut your career short –

A. Yes.

Q. – is that fair?

A. Yes.

Q. Now, are you saying that if you had stayed as an undercover officer in the Intelligence Division you would have been in less danger than you were as a patrol officer?

A. I don't know what the future would hold for any officer anywhere.

Q. Is it fair to say that regardless of which position you were working in as a patrol officer, there was some danger to you or to any officer?

[p. 79] A. Yes, street work is dangerous.

Q. Do you think that working as an undercover officer dealing with drug dealers, particularly in the caliber that I believe you and your partner have indicated you were dealing with, do you think you were in less danger then as a patrol officer?

A. If you know all of the facts when you are working undercover and you don't have any external forces interfering, when you have the confidence of your supervisors backing you, I think you have a lot of control with your undercover work.

On circumstances when you're in patrol, you can stop someone on a traffic and be killed. So it's just hard to say.

Q. Are you telling the jury in this case that you – in this particular set of circumstances, you should not have been expected to patrol neighborhoods because it wasn't safe for you?

A. Now, say that again?

Q. Are you telling the jury that you should not have been expected to serve as a patrol officer because it wasn't safe for you?

A. No, I'm not telling the jury that.

Q. Now, regarding your reputation as a police officer after you were transferred, you have indicated that

you feel [p. 80] like your reputation was damaged by the transfer.

Isn't it true that the FBI specifically requested that you and Mr. Kirks assist them on special assignments after the transfer?

A. My reputation was damaged because the supervisor of the Dallas Police Department told these people that they could have anybody but Jan Forsyth and Richard Kirks.

MR. HOPKINS: I object to this as nonresponsive, Your Honor. The question was simply were they requested by the FBI to assist them in a special project.

THE COURT: Sustained.

BY MR. HOPKINS:

Q. Were you specifically requested to assist the FBI in a project after you were transferred?

A. By Agent Paul Shannon, yes.

Q. Were your performance evaluations in the Patrol Divisions favorable to you?

A. I didn't think they were unfavorable, no.

Q. Were you disciplined in any way after you were transferred?

A. I was investigated by Internal Affairs, yes.

Q. Okay. Was there discipline resulting from that, were you – for example, were you suspended or terminated?

A. No.

Q. Did you have any problems getting along with – well, [p. 81] let me back up and ask you a different question first.

Who was your direct supervisor in the Patrol Division?

A. Bud Green.

Q. Did you have any problem getting along with Mr. Green, Sergeant Green?

A. No.

Q. Did you trust Sergeant Green?

A. Yes.

Q. Who would have been your lieutenant above Sergeant Green.

A. I don't recall. I think it was Don Carter, but I'm not positive. It came to be – it was Jake Moore at some point.

Q. Did you have any problems getting along with Lieutenant Moore or Lieutenant Carter?

A. No.

Q. Who would have been your Deputy Chief or – excuse me – who would have been your captain above the lieutenant?

A. I don't remember who the captain was back in '89. I know the deputy chief was – Pam Walt was there at the time.

Q. Did you have any problem getting along with Chief Walt?

A. No.

Q. Did you have much routine or regular contact with Chief Walt while you were in patrol?

A. I had contact with her on few occasions.

Q. Who would have been above Chief Walt in the chain of

* * *

[p. 89] THE COURT: No. Counsel is entitled to an answer to this question.

A. I'm sorry.

THE COURT: Objection overruled.

BY MR. HOPKINS:

Q. Is it your testimony that you were not financially damaged as a result of the transfer?

A. I'm getting approximately half of my salary now, because I have been disabled from the department.

Q. We talked about that. Okay.

Q. Is there any other financial damage that you are claiming in this lawsuit at this point?

A. Other than what we have already talked about, no.

Q. Now, you indicated that you believe that you could have finished your career in Intelligence, but for

the circumstances in this case. And that Lieutenant Lybrand was making inquiries into making you permanent in Intelligence. Is that correct?

A. I assumed he was, yes, sir.

Q. My notes from yesterday indicate that you said that you were in fact – your PI number was made permanent in Intelligence. Is that correct?

A. I believe it was in the process.

Q. Now, when Mr. Larson asked you yesterday who made the assurances that you could stay in Intelligence, you told us [p. 90] that Lieutenant Lybrand was making your PI permanent, correct?

A. Yes.

Q. Do you have some evidence that Chief Vines ever gave Lieutenant Lybrand the authority to make those kind of decisions?

A. No, sir. If I wasn't going to be made permanent, I assume they would taken me back, put me back in narcotics where I originally came from.

MR. HOPKINS: Your Honor, may I confer very briefly with co-counsel?

THE COURT: You may.

(Sotto voce discussion between city attorneys.)

BY MR. HOPKINS:

Q. Ms. Forsyth, yesterday I believe you indicated that – you told the jury the reasons why you decided to go to the press with this matter, correct?

A. I told you the reason why I decided to file the lawsuit.

Q. But didn't you also indicate that those reasons were also the reasons you decided to go to the press?

A. I didn't go to the press prior to the lawsuit.

Q. You didn't have any contact with the press prior to being transferred?

A. No.

APPENDIX Y

R. KIRKS – Cross-Examination by Aldrine
IN THE PRESENCE OF THE JURY

Volume III

* * *

[p. 43] take-home car, right?

A. Yes, sir.

Q. Okay. Now, the department isn't required to furnish you a take-home car, is it?

A. No, sir.

Q. Okay. Now, let's say that the department can no longer afford to give you a take-home car, would you sue them under that?

MR. LARSON: Excuse me, Your Honor, I don't believe we talked about take-home cars on Mr. Kirks direct testimony. So going into this is going outside the direct.

THE COURT: Well, this is cross-examination, though. Original cross-examination has a little more latitude.

MR. ALDRINE: Thank you, Your Honor.

BY MR. ALDRINE:

Q. Okay. Mr. Kirks, your take-home pay wasn't reduced after your transfer, was it?

A. Was my take-home pay reduced?

Q. Yes.

A. No, sir, it was not.

Q. In fact, after your transfer you made more money, didn't you?

A. Does it mean shift differential?

Q. Yes, sir.

[p. 44] A. There is a good possibility I did, yes, sir.

Q. Now, you went to Intelligence in 1983, correct?

A. I went to Intelligence in 1983?

That sounds correct, yes, sir.

Q. Around that?

A. Yes, sir.

Q. Now, part of this suit said you were upset with your transfer because you always wanted to stay in Intelligence, right?

A. I wanted to retire out of Intelligence, if that's what you are asking, yes, sir.

Q. Okay. But in 1987 you requested a transfer out of Intelligence, didn't you?

A. I believe I did, yes, sir.

Q. Okay. Now, I assume you also had to directly make official written reports to your supervisors detailing your work, right?

A. Would you ask that once again?

Q. Did you – on a regular basis do you have to make written reports to your supervisors detailing your activities in your investigation?

A. Yes, sir, I did.

Q. Okay. Now, when you make these reports, I assume they're done in a professional manner?

A. I don't follow.

* * *

[p. 46] the conspirators will be wondering what all the other conspirators have been doing since the beginning of the conspiracy? Think they could get up-tight and have heart palpitations? Maybe even a bad case of heartburn? Think their thoughts might turn toward their wallets? Here comes Santa Clause, here comes Santa Claus, here comes Santa Claus. . . . right down Santa Claus. . . . Bag full of joy. HMMMMMMMMM?"

Is that accurate?

A. I wrote that, yes, sir.

Q. Now, when you write reports and so forth, do you regularly include Christmas carols in your official reports?

A. That's not an official report, sir.

Q. Okay. Is this lawsuit against these men your bag full of joy, Mr. Kirks?

A. Would this lawsuit be a bag full of joy?

Q. Yes, sir.

A. Yes, sir.

Q. Okay. Now, you have explained the nausea, anger, sadness and loss of sleep, correct?

A. Yes, sir.

Q. But you never sought a doctor or a psychologist, did you?

A. No, I have not.

Q. Okay. You also complained that you started having [p. 47] blood in your bowel movements. Is that correct?

A. Yes, sir, I did.

Q. Wouldn't a reasonable person see a doctor if they started having those types of symptoms?

A. If it would have persisted, I would have.

Q. So it did not persist?

A. No, sir, it did not.

Q. And you can't isolate the transfer as being the sole cause of any alleged health problems. Is that correct?

A. Can I isolate the transfer as being the sole problem?

Q. Yes, sir.

A. No, sir, I cannot.

MR. ALDRINE: May we approach the bench, Your Honor.

THE COURT: You may.

(Discussion at the bench.)

MR. ALDRINE: Now, Your Honor, he claimed emotional distress, and I want to get into an area that he

was going through a divorce at the exact same time period that this suit – that he filed this suit.

I don't think they're claiming that the emotional distress was caused solely from the transfer. I think. That I should be able to open the door and say it was also caused partly by his divorce, that occurred during the same time period.

* * *

[p. 52] duty and in uniform, yes, sir.

Q. Now, with regards to the damage you believe has been done to your reputation, you believe there are people in the department who still believe the accusations against you even though you were cleared, right?

A. Yes, sir, I received reports of that.

Q. Okay. When asked you could specifically name only four individuals who still believed those accusations, correct?

A. I'm sorry. What was the question? When I was asked previously I could only name four individuals?

Q. Yes.

A. I could recall four at that time. I assume that's what I said.

Q. All right. Even though you claim your reputation suffered because of the transfer, weren't you specifically requested by the FBI and other police departments to participate in operations even after your transfer?

A. Was I requested by the FBI and other agencies?

Yes, sir.

Q. And you also claimed by being transferred to patrol you had been thrust into another position you were simply incompetent to handle?

A. One of the positions, yes, sir.

Q. Okay. And even after you made the statement that you were incompetent to handle your new assignment in patrol, [p. 53] you assured the department that you would return to training for any areas that you felt you were deficient in. Is that accurate?

A. Did I assure the department that I would return to training?

Q. For any reason that you felt that you were lacking?

A. Yes, sir.

Q. Okay.

A. I don't know if I said those exact words, but that sounds accurate.

Q. But while you claim your transfer to patrol to a position that you were incompetent to handle, you received six commendations for meritorious service, two perfect attendance commendations, two outstanding review evaluations and nomination for Officer of the Month by the Rotary Club, right?

A. Could we take that one at a time?

Basically, I agree with you, yes, sir, but I would like to take that one at a time.

What was the original question?

Q. Did you receive six commendations for work well done?

A. I received commendations. I can't tell you how many.

Q. Okay. Two perfect attendance commendations?

A. I received perfect attendance commendations. I can't say how many.

APPENDIX Z

R. HATLER – Cross-Examination by Hopkins
IN THE PRESENCE OF THE JURY

Volume IV

* * *

[p. 85] date. As I recall, that's the date, yes, sir.

Q. Okay. Before advising the plaintiffs that they were going to be transferred, did you expect them to react one way or another?

A. Yes, sir.

Q. What did you expect their reaction to be?

A. I expected a negative reaction from them.

Q. I'm sorry?

A. I expected a negative reaction from them.

Q. Why did you expect their reaction to be negative regarding their transfer?

A. Because of their personal involvement in this particular situation.

Q. Were you concerned about their reaction because you thought you might be violating their rights?

A. No, sir.

Q. Why not?

A. I was not violating their rights, to my knowledge.

Q. Now, you had mentioned with Mr. Larson a number of reasons why – or the factors that went into

your decision to recommend that the plaintiffs be transferred. And I want to make sure that I understand them completely and that the jury understands completely what your reasons were.

You mentioned that you felt that the plaintiffs were being deceptive regarding who they were going to sue, [p. 86] correct?

A. That's correct, yes, sir.

Q. Is it possible the plaintiffs didn't know who they were going to sue at the time they were asked?

A. That could be possible, yes, sir.

Q. Okay. If that was possible, then why was that a factor in your decision?

A. Well, I did not think that – since they were the ones that provided information to their attorney to file the lawsuit, I would think since they provided information, they would know what the attorney was going to be doing.

Also, because there had been inquiry made by chain of command about who was going to be – who were going to be defendants in the lawsuit that was going to be filed, they knew it was a concern of the chain of command.

I feel quite certain that had they not known who was going to go filed on, that they knew prior to the lawsuit being filed, and I felt like also they knew prior to the information getting out in the newspaper.

Knowing that the chain of command was interested in that, I felt like they should have come forward and volunteered that information.

Q. Chief Hatler, do you recall the last week when Richard Kirks was testifying in this case?

A. Yes, sir, I do.

* * *

[p. 88] were not upset or angry about the filing of the lawsuit.

Is that correct?

A. That's correct.

Q. But you were concerned about the type of information disclosed to the press?

A. Type and manner, yes, sir.

Q. In your opinion, do the plaintiffs have a right to make their complaints about the police department known?

A. Oh, yes, they do.

Q. Okay. So what is it about the disclosure of information that you were concerned about that was a factor in your decision to transfer them?

A. Several things. One we discussed at length, to the fact that the information released, as released to the news media, talks about the confidential informant.

THE COURT: I'm sorry. You are going to need to speak a little clearer.

THE WITNESS: I'm sorry, sir.

A. The one thing we discussed earlier, we talked about the need the police department has to maintain confidential information about the confidential informants.

There was one part that was concerned about negative impact on the ability to do that in the future and also ability of performance.

The second thing that caused me concern with that, at [p. 89] least the fact was the naming of the informant, the negative impact it might have.

Also, the impact it would have on other investigations ongoing at that time.

As testimony has been presented, there was a DEA investigation that had not been concluded. There was a FBI investigation ongoing on the wiretap type situation.

That concerned us.

It also concerned me that we released information while being involved in a joint investigation with other agencies, federal agencies. And releasing that information early would have a negative impact on the overall investigation. The negative impact on our ability in the future to work with those agencies and the confidence that they might have in our department and our personnel to be able to keep information in an appropriate manner.

Q. If the plaintiffs had a right to make their allegations known to the public or to file a lawsuit, wouldn't the things that you just mentioned have had to have been

included in order for them to obtain that relief or whatever relief they sought?

A. I'm sorry, sir. Restate the question, please?

Q. If the plaintiffs had a right to bring their allegations to light, in either the press or by filing a lawsuit, wouldn't they have had to disclose the information

* * *

[p. 91] reveal themselves and their identity that's – as far as it impacts them, that's their decision, and they have to live with the results of that.

I have to live with the results of information going public from our department.

Q. So is it fair to say that your – what your concern was how the department was perceived?

A. How the department was perceived, how we could work in the future.

Q. So is it fair to say that Mr. Larson and the plaintiffs kind of missed the point of what your concern was regarding the release of that information?

MR. LARSON: Excuse me, Your Honor. May we approach the bench?

THE COURT: You may.

(Discussion at the bench.)

MR. LARSON: I have resisted making an objection over leading questions because I just want to get this trial moving along, but now we're getting to the point where I – you know, he's suggesting virtually everything for him to testify to.

And I took this witness on adverse, so when he's got him, technically, he has him on direct. And I'm going to have to ask that you instruct him not to ask leading questions.

[p. 92] THE COURT: Sustained.

(Back from the bench.)

BY MR. HOPKINS:

Q. Chief Hatler, Mr. Larson asked you if you went over all of the reasons for the transfer with the plaintiffs in the meeting that you had with them on the 15th.

And what was your response?

A. No, I did not.

Q. Why didn't you go over all of the reasons with them?

A. I mentioned the confidence issue. That was a major issue.

I did not feel like Richard and Jan would be amenable to listening to any kind of declaration from me at that time. It would most likely result in arguments and a negative type situation.

I felt like when I talked about judgmental issues, that was sufficient. That was in fact the reason for transfer, the judgmental issues, about confidential issues involved. I didn't feel it was necessary to go into all of them.

I did not see a reason to go into all these factors, because I felt like, you know, it would result in a more negative contact than we were already going to have.

Q. Now, concerning this – your concern about the release of information, have you ever worked in the police department with matters concerning the Open Records Act?

[p. 93] A. Yes, sir, I have.

Q. Okay. Could you describe for the jury generally what the Open Records Act is?

MR. LARSON: Excuse me, Your Honor. That calls for a legal conclusion, which I object to.

THE COURT: Sustained.

BY MR. HOPKINS:

Q. Could you state for the jury your understanding of what the Open Records Act is?

A. Well, it's my understanding that the Open Records Act is a statute procedure whereby citizens can obtain certain governmental documents that they request and have assess [sic] to them.

Q. Okay. And could you describe for the jury what your experience has been in dealing with that act or that statute?

A. In 1986, '87, as I recall, the captain of the Legal Liaison Division, in that capacity one of my roles was to evaluate open records requests that came in and to make recommendations and decisions as to what information would or would not be released.

Also, when I worked in the Internal Affairs Division, of course, the first time as a lieutenant, I had some dealing with the Open Records Act.

I went back to Internal Affairs for a short period of [p. 94] time prior to my promotion in November 1988.

At that time the Internal Affairs Division was in the process of releasing a large number of Internal Investigations because of a backlog the situation that was being created.

So during that period of time, immediately prior to being promoted, I was looking at these investigations, making interpretations under the Open Records Act, making decisions as to what information would or would not be released.

Q. Regarding the Internal Affairs report concerning Ms. Forsyth's investigation, do you have an opinion whether that document is an open record under that statute?

MR. LARSON: Excuse me, Judge. Again, that calls for a legal conclusion.

THE COURT: Sustained.

BY MR. HOPKINS:

Q. What is your understanding of whether or not the Forsyth investigation is an open record?

MR. LARSON: That would be irrelevant as far as what the law is – lawsuit concerned and I object.

THE COURT: I'll allow him to give his understanding of it.

A. Can you restate the question, please, sir?

BY MR. HOPKINS:

[p. 95] Q. As far as your understanding as to whether or not the Forsyth investigation packet was an open record.

A. It's my opinion that the entire packet would not be subject to open record release.

Q. So are you saying parts of it would be?

A. Some parts would be, yes, sir.

Q. Do you recall questions that Mr. Larson posed to you a moment ago regarding the fact that Chief Rollins and Chief Vines would still be in the plaintiffs' chain of command after their transfer?

A. Yes, sir.

Q. Do you have an opinion as to whether their contact with Chief Rollins and Chief Vines was either greater or lesser after their transfer?

A. It would probably have been less, sir.

Q. And why would that be?

A. Two reasons. Number one, if they were transferred to patrol they wouldn't be located in the building where Chief Vines and Chief Rollins worked.

Also, in the Intelligence Division it would more likely to be involved in investigations that would come to the attention of Chief Rollins and Chief Vines.

Q. In your opinion, why would their transfers – let me rephrase the question.

In your mind, how was the transfer of the plaintiffs [p. 96] designed to solve the concerns that you had regarding their loss of confidence and trust in the chain of command?

A. They were given a new chain of command where they would – in my opinion, they would not be observing every action taken by the chain of command, either being retaliatory or being directed toward them in a negative fashion and give them pretty much a clean slate and a new chain of command up to Chief Rollins. Give them a clean up – clean slate where they could start fresh, start new.

Q. Chief Hatler, you mentioned that the plaintiffs – in your opinion – the plaintiffs' personal involvement in the investigation regarding the wiretap situation was a concern in the transfers.

Is that correct?

A. Yes, sir.

Q. Okay. What effect could their personal involvement have on such an investigation?

A. Well, if there were any criminal allegations, criminal charges brought forth as a result of their investigation there would be allegations of some kind of impropriety on their part and it would appear to be a personal vendetta that might have resulted in those charges being filed.

Q. I'm sorry. Could have resulted in what?

A. In the perception that it could be a vendetta that might have impacted the filing of the charges.

[p. 97] Q. Okay. How could it have impacted the filing of the charges?

A. Well, it would be very similar to a doctor operating on someone in his own family. A person looks into a situation personally and indirectly it affects them.

Q. Do you recall Mr. Larson asking you or suggesting that you did not initiate any disciplinary action against the plaintiffs?

A. I recall that, yes, sir.

Q. Why didn't you initiate any disciplinary action against the plaintiffs in regard to the concerns that you had that led to their transfer?

A. That I would not always be required if I – even observe a violation be required to take disciplinary action per se.

I felt like that what this situation needed was a fresh start for them, a new chain of command, give them an opportunity to work in a situation where they could be successful and contribute to the department.

That could not be accomplished through disciplinary process. I felt like the transfer process was much more appropriate.

Q. You mentioned, in your opinion, there was as lack of trust and confidence in the chain of command. And I think you expressed that it went both ways.

[p. 98] What did you mean by that?

A. I felt like they did not have the confidence in the chain of command as far as the decision-making process

was concerned; that they questioned the integrity and the ethical standards of the chain of command; that would be very long going up, and from our perspective, the chain of command going down.

And I had to be confident that the personnel could work for me. I would not do anything that would negatively impact the operation such as release of information, things of that nature.

And the reputation of individuals involved that worked for me were very important to my division and I did not have the confidence that they would perform as they could while working in that chain of command.

Q. Chief Hatler, you heard testimony last week, I believe, from Mr. Kirks regarding the drafting of an indictment?

A. Yes, sir, I do.

Q. Okay. Is there anything about that situation that seems unusual for a police officer to be engaged in?

A. Yes, sir. It would be unusual, based on my experience, for an officer to be drafting overt acts and counts, et cetera, for a federal presentation to a grand jury.

Q. Okay. What is your experience, if any, with such matters? Who usually does that?

[p. 99] A. Normally that would be done in assistance – at the direction of an Assistant U.S. Attorney or at the direction and the assistance by a federal law enforcement agency, either the FBI or DEA or some other federal agency.

Based upon my opportunity to work with the federal court system in the past, that's my opinion.

Q. Did the plaintiffs' performance as investigators have any impact on your decision regarding their transfer?

A. No, sir.

Q. Did you have any particular problem or concern about their job performance?

A. I had a concern that because of their personal involvement in this investigation they were wrapped up into it, that there could be a negative impact on the department. A negative impact on the reputation of the division and the department.

Q. You have described for the jury the concerns that you has [sic] that led to your decision to transfer the plaintiffs.

What were your other options, if any?

A. I had basically three options. I could leave them exactly where they were, I could transfer them somewhere else within the Intelligence Division or within my bureau, or I could recommend that they be transferred out.

Q. Why did you recommend to transfer out of the Intelligence Division?

[p. 100] A. If they remained within the Intelligence Division they would still be having access to sensitive information that also could be within my chain of command if they had been in the Intelligence Division or another division that worked for me.

Q. After you decided to make the recommendation to transfer the plaintiffs, what happened next after you made your decision?

A. I advised Lieutenant Lybrand of what my decision was going to be.

I also met with Chief Rollins to discuss the decision and with Chief vines to discuss that decision.

Q. And what was their reaction to you recommendation?

A. They concurred with the recommendation to transfer.

Q. Among those people that you just described having consulted, Chief Rollins and Chief Vines and Lieutenant Lybrand, did anyone express any concern about the transfer of the plaintiffs?

A. We expressed concern as far as the appearance of the transfer at that particular time, but at the time there was no concern expressed as far as the decision to make the transfer. That was a unanimous recommendation.

Q. Now, explain to me what was the concern about the transfer?

A. We realized when we made a decision – made a [p. 101] recommendation to transfer, we realized because of the timing, because of the newspaper articles, that it could appear that this would be an act of retaliation on our part. We realized that.

However, we felt like that the negative vis-a-vis the division were more important.

We examined why if in our opinion the action could have been a problem. It was our opinion it was not. So we made a decision to go ahead and effect the transfer.

Q. Were the plaintiffs' transfers in retaliation for having exercised some free speech right?

A. No, they were not.

Q. Were they transferred because they filed a lawsuit against the departments?

A. No, they were not.

Q. Were you a defendant in the first lawsuit the plaintiffs filed against the department?

A. No, I was not.

Q. Do you understand that – that we have referred to that as the Wiretap Lawsuit?

A. I understand that, yes, sir.

Q. Were any allegations made against you in connection with the wiretap lawsuit, to your knowledge?

A. Not to my knowledge, no, sir.

Q. Did you have any reason to retaliate against the [p. 102] plaintiff for having filed that lawsuit?

A. No, I did not.

Q. Were you ever instructed by Chief Vines to take some action against the plaintiffs because of the filing of the lawsuit?

A. No, sir.

Q. Were you ever instructed by Chief Rollins to take some action concerning plaintiffs because of the lawsuit?

A. No, I was not.

Q. You have indicated that you made a recommendation that the plaintiffs be transferred.

Did you have any input concerning where they would be transferred to?

A. No, sir, I did not.

Q. Could you explain to the jury why, in your opinion, the plaintiffs could not remain in the Intelligence Division and simply ordered off the wiretap investigation?

A. It was my opinion, because of the loss of the confidence, loss of discretionary time that the person would have or could have in the Intelligence Division once under structured work.

The main reason of the transfer was to remove them from that situation where there was a loss of confidence, which I felt like would have a negative impact on their ability to perform, negative impact also upon the division.

APPENDIX AA

W. ROLLINS – Direct by Hopkins
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Volume V

* * *

[p. 124] An example of that would be, for instance, if an officer had a particular expertise in a certain area or a particular skill and the department had a need for that skill in a certain area, then that transfer would be initiated.

And I think the third area, an example of that would be, for instance, in my experience we have had officers that moved into the Child Abuse Investigative Area, for instance. And after you do that for a while it's kind of repulsive, and so the officer might just say, hey, this is not good for me. I'm not being objective here anymore. So there is a mutually arrived at agreement to transfer the officer.

Q. Were you consulted or involved in the decision to transfer these plaintiffs in February of '89?

A. Yes, sir.

Q. In which of those three categories that you described would you place the transfers of the plaintiffs in '89?

A. Well, I would have to place it in the category of both for the good of the department and for the good of the officers.

Although clearly I think the good of the department here outweighed the good of the officers, although it was for both.

Q. Okay. In what sense was – were the transfers of the [p. 125] plaintiffs in February of '89 for the good of the department?

A. Well, the information that I was familiar with in my experience in intelligence concerning the circumstances here, the Barr as well as what I was told by the chain of command, indicated to me that these officers had really become entwined in this Barr situation. In my mind their objectivity had been – had been compromised. It was certainly hampered by that.

And I think it's far better to transfer an officer in that situation than it is to risk having the department have officers out there that have some sort of malicious ax to grind.

Q. In what sense would you say that this is – that these transfers were in their best interest?

A. Well, it's plainly evident, in my mind, that not only had the chain of command had trust and confidence problems with those officers, but they shared that.

And when you are in that type of environment you – not only are you not allowed by your supervisors to exercise your normal latitude of discretion that an investigator would have, but you also are looking over your shoulder from an officer's standpoint when the officer that you are supervising is behind you when you are doing something out there that's in accordance with your job. So really a fresh [p. 126] start, I think, was needed.

Q. Chief Rollins, have you ever been transferred to a position that you did not particularly want?

A. Yes, I have.

Q. Without reference to any particular transfer, how would you assess your ability to decide whether a transfer is warranted compared to the plaintiffs' ability to make such an assessment?

A. Just by virtue of the fact that I deal with dozens of these on a monthly basis and literally hundreds in my career. I would say that my ability is greater than theirs because I'm familiar with that territory. And I also see it with the larger issue from – just by virtue of my position in the department.

Q. What do you mean by "the larger issue"?

A. Well, I think an individual, when they're assessing their own transfer, can get caught up in their own personal feelings and that limits their objectivity.

Whereas, I have no personal ax to grind in this case and I was just looking at what the overall good of the entire organization would be to effect these transfers.

Q. In this particular situation when the plaintiffs were transferred in February of '89, to your knowledge, whose initial recommendation was it for those transfers?

A. Chief Hatler was the first person to approach me with [p. 127] it.

Q. Had you had a prior working relationship with Chief Hatler before he came to you with that recommendation regarding the plaintiffs?

A. Yes, sir.

Q. Okay. Did you have any particular opinion of Chief Hatler at the time that he made that recommendation?

A. Well, I have known Chief Hatler for over 20 years. And I have known him to be an outstanding individual and supervisor of the department. I trust Chief Hatler. He's always very business oriented and always concerned about serving the citizens of Dallas in the best way that we can.

Q. Did Chief Hatler tell you why he was recommending the transfers of the plaintiffs?

A. Yes, he did.

Q. What is your recollection of the reasons that he gave you?

A. Well, as I stated in my deposition, I can't recall the specific reasons that he talked about, although we did talk about specific reasons. But it all boiled down to the confidence and trust issue. And that was entwined in this obsession – for lack of a better word – that both the plaintiffs had about the Barr situation.

Q. How do you characterize this, what you call the lack of trust or confidence, what was your belief as to what the

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APPENDIX BB

J. FORSYTH – Direct by Larson
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Volume I

* * *

[p. 170] conversations were still continuing to be monitored by Gary Dulworth, a targeted offender, and his family.

They were monitoring the FBI.

The were monitoring DEA conversations.

They were monitoring my informants, their parents.

Whoever was talking on that telephone, they were monitoring their conversations.

And they were setting up dangerous drug buys, reverse stings, stolen cars. That information was allowed to continue for almost two weeks before my partner and I knew that Gary Dulworth was monitoring these telephone conversations with his family.

Q. All right. Now, is that the substance of the complaints that you had given to Lieutenant Lybrand to ask him to look into?

A. Yes, it was one of them.

Q. All right. Now, ultimately after you spoke with Mr. Alexander you chose to bring litigation against the city and Captain Walker and Lieutenant – or pardon me – Captain Rollins and the police chief. Isn't that correct?

A. We chose to bring litigation when we tried to get an Internal Affairs investigation done on Chief Rollins and Captain Walker.

We initiated memos.

We initiated Dear Chiefs in attempting to get an [p. 171] Internal Affairs investigation based on their behavior of what they did to us.

After it was told to us that we would put this down and not talk about it anymore, at that point we decided they weren't going to do anything about our complaint, citizens of Dallas, they weren't protecting anybody and it was allowed to go on and they were covering it up and when they refused to investigate it, that's when my partner and I decided to go public with it and file the lawsuit and go and talk to the news.

Q. All right. Now, Ms. Forsyth, did you have any conversations during this time frame with Captain Rollins about Mr. Barr?

A. Yes. After –

Q. All right. Just say yes.

A. Yes.

Q. Okay. What was the conversations that you had with Mr. Barr – pardon me – Mr. Rollins concerning Mr. Barr?

A. After my initial – our initial meeting with Lewis Jaggi on January the 30th, Chief Rollins called me while I was in Intelligence and he told me that we do not need to be looking into John Barr, that he socialized with him in

the Crime Commission luncheon and it would look like retaliation and we needed to just leave it alone.

At that point – I think it was approximately an hour

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J. FORSYTH – Cross-Examination by Hopkins
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Volume II

* * *

[p. 86] you transferred to patrol?

A. After our transfer from Intelligence, right.

Q. Now, when you complained about your ability to eat when you want to, or go to the bathroom when you need to, are you complaining that you should have somehow gotten preferential treatment above any other patrol officer?

A. I believe when the question was directed to me it was did I feel like it was a less desirable position being transferred from Intelligence to Patrol.

And my response – those were my responses as to the less desirable conditions.

Q. But there again, they're not unique to you and Mr. Kirks, it's something that's inherent in patrol work?

A. That's correct.

Q. Well, my question now is: Do you think you should have somehow been excused from those conditions or given some type of preferential treatment?

A. I don't believe we should have been transferred to patrol for bringing this evidence of wrongdoing to the public. I believe that was my complaint.

Q. Ms. Forsyth, in response to Mr. Larson's questions about how the transfer affected you financially, you mentioned that you had to buy a car?

A. Yes.

Q. Earlier in the course of this litigation didn't you [p. 87] also indicate you were affected financially in terms of cleaning bills for your patrol uniform?

A. Yes.

Q. How much was that – those cleaning bills?

A. I don't recall. I think I said it at the time.

Q. Would it refresh your recollection if I suggested that you said that it was about $15 a month?

A. That would be fine, I guess.

Q. Now, is it your position that the jury should award you $15 a month for your cleaning bills in this case, or have you withdrawn that?

A. It was never my position that the jury should award me for my cleaning bills or my car.

Q. Okay. Regarding your car, when – at the time that you were transferred did you own a car?

A. Yes.

Q. Could you have driven that car to and from work?

A. Yes, I could –

MR. LARSON: Excuse me. How can that possibly be relevant when she just testified she's not asking –

THE COURT: Sustained.

BY MR. HOPKINS:

Q. So that I understand, your testimony is that you were not complaining about having to buy another car in this lawsuit. Is that right?

[p. 88] A. In this lawsuit I'm not complaining about my $15 bill for my uniform or my car allowance.

I'm complaining because I was retaliated against and transferred for bringing about something of concern to the public. That's my complaint.

Q. When Mr. Larson asked you how you were damaged financially, and you responded that you had to by [sic] a car –

A. Yes.

Q. Why did you bring that up at all?

MR. LARSON: Excuse me, Judge. Now we're going back – we are going through – going right back in it. I object to it.

THE COURT: Sustained.

BY MR. HOPKINS:

Q. Was it your testimony that you felt the transfer put you at risk because you were now appearing in uniform after having been undercover for several years?

MR. LARSON: Excuse me. That wasn't even gone into on direct. So I'm going to object to that as well.

THE COURT: Sustained.

BY MR. HOPKINS:

Q. Do I understand your testimony to be at this point you do not claim any financial problems with the transfer?

MR. LARSON: Excuse me, Your Honor. He's beating a dead horse. Objection.

* * *

APPENDIX CC

R. KIRKS – Direct by Larson
IN THE PRESENCE OF THE JURY

Volume II

* * *

[p. 170] tell him what he was supposed to tell your higher up authorities in the department as to who might be a defendant in the lawsuit?

A. Did I try to restrict Lybrand?

Q. Yeah. Did you tell Lybrand don't tell anybody up higher up in the department? Something to that effect.

A. No.

Q. Did you – did he indicate that he was going to keep that between you and him?

A. No.

Q. Did he indicate he was going to transfer that up higher up?

A. (No response.)

Q. That information about who might be the other litigants?

A. I don't recall him doing it. He may have. I don't, as a matter of fact, recall him – it seems like Hatler might have inquired about it, but I'm not real sure about that.

Q. All right. Now, you heard the opening statement in this case, isn't that correct, by both sides, by both me and the lawyers?

A. Yes, sir, I did.

Q. All right. You heard the list of those things that as to why you were transferred.

[p. 171] Do you remember those?

A. I remember all the reasons I have been told. I don't remember what all you said.

Q. What reasons have you been told as to why you should be transferred?

A. I was told that to keep you quite [sic].

Q. Who told you that?

A. Richard Hatler.

Q. All right. Who else?

A. He said that you are my employee. And that if he saw another thing in the newspaper that he could contribute to you – or me, that I would be transferred.

Q. All right.

A. He also told me that there – can I refer to that list? It's been six years.

Here it is. Is it okay if I look at this?

Q. Sure. Go ahead.

A. The first meeting on the 7th – this is exactly why I did this, so I would have it exactly correct.

The first thing says –

MR. BOYD: Identify it by exhibit number, apparently referring to an exhibit.

THE COURT: If he is referring to an exhibit.

MR. LARSON: I believe he is, Judge. He has one of the defendant's exhibit [sic], the transcript of the conversation.

[p. 172] A. Either I-30 or 130, defendant's exhibit.

BY MR. LARSON:

Q. It's 130. Go ahead.

A. It's the February 7th transcript when we taped three of our supervisors.

Chief Hatler says: I'm going to be short with you on this thing – the continuing saga of John Barr. This article apparently came from an IAD investigation, at least parts of it did, and you are the only one that had a copy of this.

And he started out about how we could not talk to the press for a variety of reasons.

He later said that internal investigations are not subject to open records to the extent that the attorneys said they were.

He said we exposed our spies – well, he referred to them as snitches, which I thought was improper.

Q. When you say spies or snitches, who were y'all referring to?

A. Confidential informants.

Again, I call them spies, but he prefers to call them snitches, which I think is derogatory.

He said that we have exposed them to the news media.

And I recalled his attention that long ago they had approached T.V., radio, newspapers, in writing, in person, [p. 173] they were mad, they had every right to be mad, they wanted some action and they are not getting it.

So we pointed that out to him, that we had not exposed any confidential informants by the release of this.

I assume he said that later on and he came back to that subject again. For a moment he seemed to accept it.

Then I asked him what we had done wrong.

He said: You have done nothing wrong.

He said: We're not talking about y'all saying or doing anything wrong.

He said. Richard, your misconception is strictly a personal vendetta between y'all and John Barr, and it's generated to the point that it's kind of . . . he ended at that.

Then Jan asked him about the memo that we had generated and the internal complaint against our chiefs.

And he said: It's being looked into.

He said: That our account and Jaggi's account is not altogether consistent.

We talked about John Barr further.

He then discussed the internal investigation that Jan and I were being involved in.

MR. ALDRINE: Objection, Your Honor. He's being nonresponsive. Can we just get an answer as to what the reasons were.

[p. 174] THE COURT: Sustained.

BY MR. LARSON:

Q. The question on the floor was: Were you told any reason for your transfer?

A. I'm going through the list listing them.

Q. All right, sir. Go ahead. Are there any others that you can recall?

A. He went on talking about again about the press and said you were our employee, and that if he sees anything further in there, sees anymore articles, he said being attributed to you or to us, he promises he would transfer us.

He said that we violated Open Records Act by our – we violated some sort of order of open records or some policy of the department that regulates open records. He was not too clear on that.

Q. All right. Now –

A. But he said it should have never been released.

Q. Okay. Let's discuss those matters that you have listed off for a moment.

Your dealings with the Brutons had ended, I believe you testified earlier, in late November of '88. Is that correct?

A. Working them as confidential informants, they had the lawsuit, deposition, things of that nature.

Q. I understand. But by that time the – had anybody been

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R. KIRKS – Cross-Examination by Aldrine
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* * *

[p. 16] civil rights, other agen. and also directly endangered our lives.

Is that accurate?

A. I said, I believe –

Q. Is that accurate, Mr. Kirks?

A. Yes, sir.

Q. Okay. By that time, by January 6th, the DPD had turned over the wiretap investigation to the FBI. Is that correct?

A. By January the 6th, 1989 the DPD had turned over the investigation to the FBI?

Q. Yes, sir.

A. Yes, sir.

Q. And Detective Robert Jennings of Internal Affairs turned over the wiretap investigation to the FBI, correct?

A. Yes, sir, that's correct. That's my understanding.

Q. In fact, the DPD had turned it over to the FBI in October of 1988, right?

A. Yes, sir, that's my understanding.

Q. Okay. And the function of the FBI was to investigate the criminal allegations of any wiretap violations, right?

A. Yes, sir, I believe so. There may have been others. I don't know.

Q. Now, part of your allegations was nothing was done with your internal complaints about your superiors' alleged [p. 17] involvement in the wiretap situation, correct?

A. I'm sorry. Would you restate, sir?

Q. Did – part of your allegations was that nothing was done with your internal complaints where you alleged that your superiors had involved themselves in the wiretap situation, correct?

A. You're asking if that was part of my complaint?

Yes, sir, it was.

Q. You were upset that no internal investigation was initiated when you complained about that, correct?

A. Yes, sir.

Q. But criminal investigations such as the one the FBI was conducting take precedence over internal ones, don't they?

A. No. Generally the criminal investigation went on the same time that the administrative did.

Q. Do you remember taking your deposition on February 23rd of 1990?

A. Yes, sir. That was [sic] same date that you just showed me on the other one.

Q. I think that was February 20th.

MR. ALDRINE: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. ALDRINE:

Q. Okay. I'm going to read this, and you tell me if I'm

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Supreme Court, U.S.
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(2)

No. 96-1927

In The

Supreme Court of the United States

October Term, 1996

CITY OF DALLAS, TEXAS, WILLARD ROLLINS, RICHARD HATLER,

Petitioners,

vs.

RICHARD KIRKS and JAN FORSYTH,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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23 pp

LIST OF INTERESTED PARTIES

The parties to this proceeding are as follows:

City of Dallas	Defendant-Petitioner
Willard Rollins	Defendant-Petitioner
Richard Hatler	Defendant-Petitioner
Mack Vines	Defendant Only
Jan Forsyth	Plaintiff-Respondent
Richard Kirks	Plaintiff-Respondent
Douglas R. Larson	Attorney for Respondents
Russell H. Daniels	Attorney for Respondents
Sam A. Lindsay	Attorney for Petitioners
Janice Moss	Attorney for Petitioners
Bill Boyd	Attorney for Defendant-Mack Vines

Each of the respondents join in this brief in opposition.

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TO THE UNITED STATES SUPREME COURT:

Respondents Richard Kirks and Jan Forsyth, hereby request that the Supreme Court deny Petitioners', the City of Dallas, *et al.*, application for a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals Opinion is reported at 91 F.3d 769 (5th Cir. 1996). In opposition to this application for Writ of Certiorari, Respondents would respectfully show the court the following:

STATEMENT OF THE CASE

Primarily, Respondents would note that Petitioners' statement of facts materially misrepresents the evidence in this case and completely disregards in many material respects the jury's verdict and Fifth Circuit panel opinion. The Court should view with a critical eye the motivations of such tactics. Even though the Court does not have the Record in this case, Respondents to demonstrate that the Record supports the facts as they are reported here in this brief contains citations to the record. Respondents submit the following statement of facts which are consistent with the jury's verdict, as well as the district court and Fifth Circuit review of the same:

Respondent Jan Forsyth ("Forsyth") began her career in the Dallas Police Department as a secretary in 1973 and became a patrol officer in 1976 (R. Vol. 7, p. 126). Forsyth served four or five years in patrol before she was promoted to a plain clothes detective in the Burglary and Theft Unit (*Id.* at pp. 126-27). In approximately 1981, Forsyth moved into undercover work as a detective in the Narcotics Division (*Id.* at p. 127), and thereafter progressed to detective in the Intelligence Division in 1987.

Respondent Richard Kirks ("Kirks") began his police career in Fort Worth, Texas, in 1967 and joined the Dallas Police Department in 1970 (R. Vol. 8, p. 117). Kirks spent his first three or four years as a patrol officer (*Id.* at p. 118). Kirks

thereafter spent time as a detective in the District Attorney's Office, moved to the position of detective in the Narcotics Division in 1979, and ultimately progressed to the position of detective in the Intelligence Division in 1983 (*Id.* at pp. 118-19).

Beginning in March of 1988, Respondents' became immersed in a dispute between Respondents' informant, a well-connected Dallas lawyer named John Barr ("Barr"), and a politically influential Dallas business man named George Grogan ("Grogan") (R. Vol. 7, pp. 133-35; Exs. 18 and 32). Respondents' refusal to assist Barr and Grogan resulted in false charges being levelled against Respondents by Barr and Grogan, and an Internal Affairs investigation regarding the same (R. Vol. 8, pp. 144-45; Ex. 18). (Although the IAD Complaint only named Detective Forsyth, the actual investigation also involved Detective Kirks.) In the latter part of December, 1988 Forsyth was presented with the completed Internal Affairs investigation (hereinafter "IAD Packet"), which exonerated her of all wrongdoing (Plaintiffs' Ex. 18; Defendants Ex. 149).

After studying the IAD Packet, Kirks and Forsyth formed the good faith belief that several high ranking Dallas police officials, and particularly Petitioner Willard Rollins, had violated state and federal criminal wiretap laws (R. Vol. 7, pp. 149-51; R. Vol. 8, p. 140). Convinced that Dallas citizens had a right to know that the Dallas Police Department would not criminally investigate its own high ranking officials, the Respondents took action and exposed the matter to the public.

As a direct result of the Respondents' First Amendment speech, a newspaper article appeared on the front page of the February 5, 1989 Sunday edition of the *Dallas Morning News* (Ex. 32). The article precipitated a meeting on February 7, 1989 between the Respondents, their chain of command, and Petitioner Richard Hatler. During the meeting Petitioner Hatler articulated his displeasure of adverse publicity and informed

Respondents that he would hold them personally accountable for any more negative press articles. Petitioner Hatler instructed Respondents to curtail any further publicity. Critically, Petitioner Hatler directly "promised" Forsyth and Kirks that they would be transferred from the Intelligence Division if another newspaper article he could attribute to them appeared in the press (Ex. 130 at p. 5).

A second newspaper article appeared in the *Dallas Morning News* regarding the Respondents' allegations on February 14, 1989 (Ex. 36). Petitioners Rollins and Hatler effectuated the Respondents' involuntary transfer the next day, February 15, 1989 "effective as soon as possible" (Exs. 38 and 39). The Respondents were split up and involuntarily transferred back to where they had begun their respective careers with the Dallas Police Department — uniformed night patrol duty.

At trial, Petitioner Hatler proffered multiple reasons as to why he transferred the Respondents from Intelligence back to patrol, none of which he claimed had to do with free speech activity (R. Vol. 10, pp. 29-30, 34, 39-40, 48-49, 53-57, 63-66, 85-102). The jury fully heard, and fully rejected, Hatler's testimony. Hatler also testified that he knew it was unlawful to retaliatorily transfer police personnel for free speech activities, and he denied transferring Respondents for these reasons (R. Vol. 10 at pp. 85, 88-89, 101-103, 109). Noteworthy however, Hatler admitted that the event which precipitated the transfer was the second newspaper article (R. Vol. 10, pp. 139-140). Moreover, the jury found Hatler's actions in transferring Respondents so intentional, retaliatory and unconscionable, that they punished Hatler with exemplary damages.

Defendant Rollins testified that he had been long time friends with Petitioner Hatler (R. Vol. 11, pp. 127, 153-54), that he had read both newspaper articles prior to the transfer (*Id.* at pp. 133, 175), and that he was aware that the Respondents had some "complaints" against him as of the date of the transfer

(*Id.* at pp. 167, 173). Petitioner Rollins further testified that he had studied First Amendment law, he was fully aware that he could not retaliatory transfer police personnel for First Amendment activities, and he denied transferring Respondents for any improper or unlawful reasons (*Id.* at pp. 133, 141-46, 160). The jury fully heard Rollins' testimony and proffered explanations for the Respondents' transfer and categorically rejected the same. The jury found Rollins' actions in transferring Respondents so intentional, retaliatory and unconscionable that they punished Rollins with exemplary damages.

Contrary to Petitioners' arguments otherwise, Respondents fully and credibly established at trial that an involuntary transfer from an assignment as a detective in the Intelligence Unit back to uniformed night patrol duty was an adverse employment action that actually constituted a demotion, and that such involuntary transfers had been used before the Respondents' transfers as punishment within the Dallas Police Department.

After a long and thoughtful deliberation, the jury credited Respondents' version of the events, wholly rejected the testimony of Petitioners Rollins and Hatler, and rendered a verdict in favor of Respondents against both the individual petitioners and the City of Dallas.

At the trial in the district court the Respondents sought damages under two theories; one theory was First Amendment retaliation and the second was for violations of the Texas Whistleblower Act. The jury returned verdicts for the Respondents under both theories. The judgment of the Court of Appeals held the individual Petitioners, Hatler and Rollins liable under First Amendment and § 1983 principles. The judgment against the City of Dallas is based solely on Texas Statutory law, *i.e.* the Texas Whistleblower Act.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS CANNOT ESTABLISH THAT EITHER THE DISTRICT COURT OR THE PANEL OPINION IS ERRONEOUS ON THE MERITS.

Respondents would note that Petitioners misrepresent the evidence as well as the Fifth Circuit's holding in the *Forsyth* case. The jury, the district court and the appellate court have all considered the merits of this case and they have uniformly and easily concluded that the individual Petitioners' egregious conduct toward Respondents constituted retaliation for the First Amendment speech and that Respondents' transfer constituted an adverse employment action. Petitioners' Application on its face misrepresents the nature of Respondents' transfer in a fruitless effort to disguise the hollow nature of their claims.

The individual Petitioners continue to argue that the law was not clearly established in 1989 that the transfer at issue was effectively a demotion and therefore in violation of the First Amendment. This argument on the issue of qualified immunity is frivolous for multiple reasons. Respondents assert initially that the proper focus for qualified immunity analysis in a First Amendment retaliation case is whether the law was clearly established in 1989 that retaliation and adverse employment action against a public employee for protected speech was unlawful. The law on this issue was very clearly established in 1989 when the retaliation and adverse employment actions taken against the Respondents occurred. *Connick v. Myers*, 461 U.S. 138 (1983); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987); *Brantley v. Surles*, 718 F.2d 1354, 1358 (5th Cir. 1983); *Bickel v. Burkhart*, 632 F.2d 1251, 1255 n.6 (5th Cir. 1980). In addition, the individual Petitioners testified at trial that they knew in 1989 that it was unlawful to retaliatorily

transfer employees for free speech activities. It would be factually impossible for the Petitioners to proffer such testimony if the law was not clearly established in 1989.

It was a fact issue resolved by the jury in favor of Respondents that the Respondents' transfer to patrol was indeed retaliatory. The Petitioners should not be allowed to attempt to retry the case in the Supreme Court with their belated arguments to second guess the jury verdict. Their purported claim that the Petitioners' order that the Respondents be involuntary transferred back to patrol was not retaliatory is laughable. Any aficionado of popular culture who watches televised police shows knows the way a superior in a police department controls his detectives is to threaten them with "transfer back to patrol." (Circuit Judge Barksdale even made this very observation during oral argument.)

Moreover, the law regarding unlawful transfers was clearly established in 1989. *See Click v. Copeland*, 970 F.2d 106, 111 (5th Cir. 1990); *Reeves*, 828 F.2d 1096, 1100; *Bickel*, 632 F.2d 1251, 1255 n.6. "For a right to be clearly established, there does not have to be a case directly on point, but the unlawfulness of the precipitating acts must be apparent in light of existing law." *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.2d 1075, 1079 (5th Cir. 1995)(citing *Anderson v. Creighton*, 483 U.S. 635 (1987)). The Supreme Court in this term in *United States v. Lanier*, __ U.S. __, 117 S. Ct. 1219 (1997) echoed this principle in a case involving a criminal equivalent to § 1983. In *United States v. Lanier*, *supra*, the Supreme Court said that it was not necessary or required for there to be a case directly describing the conduct in question as unconstitutional but that in light of the preexisting law the unlawfulness of the Defendants' (Petitioners') conduct was apparent. Given the Petitioners' testimony, the findings of the district court, the long history of law regarding unlawful First Amendment retaliation, and particularly the legal precedent regarding unlawful transfers, the qualified immunity arguments of the individual Petitioners lack credibility. Their lack of

credibility is more apparent because the Petitioners violated the central public policy underlying qualified immunity, which is the early resolution of the defense by the district court.

II.

PETITIONERS HAVE UNCLEAN HANDS ON THE ISSUE OF QUALIFIED IMMUNITY.

Respondents would note that the central public policy which underlies qualified immunity "is to spare a Defendant . . . [the] unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1990); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The individual Petitioners violated this public policy when they failed to have the issue of qualified immunity determined by the district court prior to trial. Instead, the first time the issue of qualified immunity was presented to the district court for determination was at trial at the close of Plaintiffs' case-in-chief. Obviously the Dallas City Attorneys office must not have considered the defense of qualified immunity too important or too critical, otherwise they would have timely raised the issue prior to trial. Petitioners had five years during the pre-trial litigation process to timely present the issue of qualified immunity to the district court, and never did so. Because the Petitioners ignored their "right" to possibly avoid the whole litigation process, they have waived their right to assert qualified immunity.

III.

PETITIONERS' CLAIM OF QUALIFIED IMMUNITY ALSO FAILS BECAUSE THE JURY CONCLUDED THAT PETITIONERS KNOWINGLY VIOLATED THE LAW.

At trial, Petitioners Rollins and Hatler testified that they knew in February, 1989, it was unlawful to transfer employees

in retaliation for First Amendment rights. These Petitioners testified they did not retaliatorily transfer Respondents. The jury however, based upon voluminous evidence adduced at trial, disbelieved Rollins and Hatler and found them liable for retaliatorily transferring Respondents. "Accidental" retaliation is factually impossible. *See Ray v. Iuka Special Mun. Separate Sch. Dist.*, 51 F.3d 1246, 1252 (5th Cir. 1995). The jury decided that Rollins and Hatler "knowingly" violated the law. Because the doctrine of qualified immunity does not protect those who "knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341-43 (1986), Petitioners are not entitled to qualified immunity.

IV.

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUE OF QUALIFIED IMMUNITY.

Petitioners again mislead the court by attempting to create a perceived conflict among the circuit courts where no actual conflict exists. Petitioners cite the Court to *Rogers v. Miller*, 57 F.3d 986, 992 (11th Cir. 1995); *Pierce v. Texas Dep't of Criminal Justice, Institution Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994); *Dahm v. Flynn*, 60 F.3d 253, 258 (7th Cir. 1994); *Akers v. Caperton*, 998 F.2d 220 (4th Cir. 1993); *Agosto-De-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1218 (1st Cir. 1989); and *Bennis v. Gable*, 823 F.2d 723 (3rd Cir. 1987) for the proposition that transfers akin to those in the instant case are not adverse employment actions. Such a claim lacks substantive merit.

First, as stated earlier, Petitioners' characterization of the transfers at issue completely mischaracterize and misrepresent the evidence admitted at trial as well as the jury's verdict. Unrefuted evidence at trial established that Respondents were veteran detectives who worked within the most highly respected and sought after division in the Dallas Police Department, the Intelligence Unit. Respondents were retaliatorily transferred back to uniformed patrol on the deep night shift, where they

began their careers with the Dallas Police Department. The evidence at trial overwhelmingly established such a transfer to be both an adverse employment action and an act of retaliation. All the cases cited above by Petitioners support and are consistent with the proposition that such a transfer would constitute an adverse employment decision.

Finally, Respondents also importantly note that Petitioners never attempt to articulate to the Court how the above cited cases are in conflict with the Fifth Circuit's opinion. Petitioners merely state the conclusion that the cases do conflict, which is improper because the cases are not in conflict.

V.

QUALIFIED IMMUNITY IS NOT A JURY ISSUE IN THIS CASE.

Respondents would first reiterate that the reason Petitioners were forced to argue that qualified immunity is a jury issue is because Petitioners *never timely presented qualified immunity as a question of law to the district court.* Not withstanding this fact, the Petitioners now wish the Supreme Court to overturn a principle of law first decided fifteen years ago in *Harlow v. Fitzgerald*, 457 U.S. 80 (1982), by suggesting that the Court should *require* the submission of the question of qualified immunity to the jury. Since *Harlow v. Fitzgerald*, this Court has reiterated numerous times that the question of qualified immunity is a question of law that should be disposed of early on by the district court. *E.g. see Mitchell v. Forsyth*, *supra*, and *Siegert v. Gilley*, *supra*. The Petitioners contend that issues of fact pertaining to their claims of immunity should have been submitted to the jury. The only possible issues of fact involving this claim were submitted to the jury and they were resolved against them by the jury. The jury found that the Petitioners' order to transfer Respondents to patrol was an adverse employment action and an act of retaliation. Regardless,

Petitioners did not and cannot meet the standards which guide jury charge challenges set forth by the Fifth Circuit in *Bender v. Brumlee*, 1 F.3d 271, 276-77 (5th Cir. 1992). First, the district court's charge properly guided the jury. Second, given the jury's findings that the transfers were adverse employment acts as well as an act of intentional retaliation by Petitioners, coupled with the jury's imposition of exemplary damages against the individual Petitioners, it is inconceivable that the jury would or could have done anything to benefit the Petitioners' cause. Accordingly, the issue of whether qualified immunity should have been submitted to the jury is not worthy of Supreme Court consideration.

VI.

THERE IS NO FACT CONTROVERSY OR LEGAL ISSUE REGARDING WHETHER PETITIONERS' INTERESTS IN PROMOTING EFFICIENCY OUTWEIGHS RESPONDENTS' INTEREST IN COMMENTING ON MATTERS OF PUBLIC CONCERN.

The Record does not support any claim that the Respondents' free speech interfered with the operation of the City of Dallas Police Department. *See Forsyth, et al. v. City of Dallas, et al.*, at 774 (noting that "[n]o defense witness testified that Forsyth and Kirk's publication of the wiretapping allegations undermined the DPD's operations. To the contrary, those witnesses testified that the newspaper articles did not affect the Departments' efficiency.") This issue is frivolous because the Petitioners are attempting to create an issue where none exists. The Record does not support an analysis of the Petitioners' interest in promoting efficiency versus the Respondents' interest in commenting on matters of public concern. The undisputed testimony at trial, from the individual Petitioners, was that the Respondents speech activities did not adversely affect, in any way, the internal operations of the Dallas Police Department. The first time this argument was raised by Petitioners was in

post-trial motions, and it was rejected totally without success. Respondents cannot credibly establish any basis for this issue. Accordingly, Respondents assert that this issue cannot warrant Supreme Court review.

VII.

THERE IS NO WORTHY ISSUE FOR SUPREME COURT CONSIDERATION CONCERNING THE PUNITIVE DAMAGE AWARD.

Petitioners improperly challenge the propriety of punitive damages assessed against the individual Petitioners, Hatler and Rollins. On their face these issues do not warrant review, and amount only to a factual argument that the individual Petitioners did nothing wrong to Respondents which would justify the imposition of punitive damages. The Court of Appeals carefully reviewed the Record and determined that a reasonable jury could conclude that the individual Petitioners acted with malice and callous disregard towards the Respondents. *Forsyth et al. v. City of Dallas et al.*, 91 F.3d 769 at 774-775. It is understandable that the petitioners disagree with the jury's verdict but such a disagreement does not authorize a legal challenge to the verdict. The Petitioners insinuate that the district court did not instruct the jury on the requirements for punitive damages. This is neither true nor accurate as the district court instructed the jury in accordance with *Smith v. Wade*, 461 U.S. 30 (1983) and properly conditioned the jury's finding of punitive damages on findings of liability and actual damages.

VIII.

THE COURT OF APPEALS PROPERLY DETERMINED MATTERS OF STATE LAW.

The district court in this cause sits in Dallas, Texas. The Court of Appeals for the Fifth Circuit includes the State of Texas. The judge on the Court of Appeals who wrote the opinion for the Court of Appeals is a Texas lawyer and a Texas resident. These Judges are extremely well qualified to determine issues of (Texas) state law. Further, the Petitioners have not cited one Texas case that the Court of Appeals has offended by its decision. The Supreme Court, by policy, defers to the Court of Appeals on matters where the Court of Appeals has determined State law. *See Haring v. Prosise*, 462 U.S. 304, 314 n.8 (1983); *Bishop v. Wood*, 426 U.S. 341, 345 (1976); and *United States v. Durham Lumber Co.*, 363 U.S. 522 (1960). Contrary to the Petitioners' claims, the district court required that the jury's determination of whistleblower punitive damages be based on a finding of malice. The Petitioners have misstated the Record by claiming that the whistleblower claim was bottomed on the reports in the newspaper; this is completely inaccurate because in addition to the newspaper accounts, Respondents reported their supervisors' conduct to appropriate law enforcement authorities. The Fifth Circuit, who reviewed the facts and evidence in detail, determined this to be accurate. Consequently, Petitioners have presented nothing concerning the Court of Appeals decision concerning the Texas Whistleblower law that merits Supreme Court review.

IX.

THERE IS NO ISSUE TO CONSIDER REGARDING THE MUNICIPAL LIABILITY OF THE CITY OF DALLAS.

The City of Dallas was not held monetarily liable under 42 U.S.C. § 1983. The *Forsyth* opinion decided no issue related to municipal liability, and there is no controlling, adverse authority against the City of Dallas on the issue of municipal liability. There is therefore no municipal liability "controversy" for the Court to resolve. Regardless of this, the City of Dallas, in an apparent attempt at shotgun litigation, attempts to create a municipal liability claim where there is not one. The Court should ignore this hollow and frivolous claim.

X.

PETITIONERS' APPLICATION FOR CERTIORARI DOES NOT APPEAR TO BE TIMELY MADE.

The power of the Supreme Court to grant a Writ of Certiorari is dependant on the Petitioners' timely presentation of a Writ of Certiorari to the Supreme Court. The Respondents believe that the Writ of Certiorari is jurisdictionally time barred, therefore, Petitioners' writ of certiorari should not be considered. Because of FRAP 36 the Respondents believe the judgment in the Court of Appeals is actually dated November 15, 1996 and because the Petitioners did not file a motion in the Court of Appeals to rehear this "judgment", the 90-day jurisdictional time provided by 28 U.S.C. § 2101 and Supreme Court Rule 13(1) expired in mid-February, 1997. If Respondents are correct this would render the Petitioners' application for certiorari tardy by over three and a half months.

A brief review of the procedural history in this cause in the Court of Appeals shows the basis for the Respondents' belief

that the Petitioners' Writ of Certiorari is time barred. (The Petitioners were the Appellants in the Court of Appeals.) On August 16, 1996, the Court of Appeals issued its opinion. This opinion affirmed the judgment of the district court in all respects. The Appellants on August 29, 1996, sought an extension to file a Motion for Rehearing and this request was granted by the Court on August 29, 1996. Also on August 29, 1996 the Plaintiffs-Appellees (here Respondents) timely filed a Motion to Amend the Judgment. This motion to amend the Court of Appeals' judgment sought an amendment to provide for an award of attorney's fees (pursuant to 42 U.S.C. § 1988) for prevailing on appeal. (On September 6, 1996 the Petitioners filed a motion for rehearing and a suggestion for rehearing en banc.) On November 15, 1996 the Court of Appeals amended its previous judgment and stated as follows:

> It is ordered that the supplemental motion of Appellees to amend the August 16, 1996 judgment is GRANTED to the extent necessary to remand the issue of attorneys' fees;
>
> IT IS FURTHER ORDERED that the alternative request of Appellees to remand the issue of attorney's fees back to the District Court for determination is GRANTED.
>
> IT IS FURTHER ORDERED that the alternative request of Appellees that the Court independently set the award of attorneys' fees is DENIED as unnecessary.

On November 15, 1996, the Clerk for the Court of Appeals made a docket entry reflecting the Court's November 15, 1996 decision. The docket entry states as follows: " 'November 15, 1996 Modified Opinion Issued' Pursuant to Rule 36 FRAP".

Accordingly, pursuant to FRAP 36, November 15, 1996 should be considered the date of the judgment in the Court of Appeals. The Clerk of the Court of Appeals on November 15, 1996 disseminated copies of this opinion/judgment to all counsel of record.

The amended November 15, 1996 judgment of the Court of Appeals rendered moot the Appellants' (Petitioners') September 6, 1996 motion for rehearing and suggestion for rehearing en banc. The docket sheet for the Court of Appeals indicates that the Court of Appeals considered that the November 15, 1996 amended judgment rendered the Petitioners' Motion for Rehearing moot.

On December 6, 1996 the Clerk for the Court of Appeals failed to forward the mandate to the District Clerk for the Northern District of Texas, but belatedly did so on March 6, 1997. In the opinion of Respondents, every act by the Petitioners after March 6, 1997 is nothing more than an attempt to resurrect the Petitioners' ability to timely present their Writ of Certiorari to the Supreme Court. Orders entered by the judges in the Court of Appeals subsequent to March 6, 1997 does not appear to alter the date of the judgment from November 15, 1996. In fact, the Court of Appeals' Order of March 31, 1997 appears to confirm November 15, 1996 as the date of the judgment. (*See* Appendix C to Petitioners' Writ Application.)

CONCLUSION

The Writ of Certiorari should be denied. Should the Writ of Certiorari be denied, Respondents' request that an appropriate order be entered pursuant to 42 U.S.C. § 1988 providing Respondents' attorneys fees in this matter.

Respectfully submitted,

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

CITY OF DALLAS, TEXAS, WILLARD ROLLINS, RICHARD HATLER,

Petitioners,

vs.

RICHARD KIRKS and JAN FORSYTH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners City of Dallas, Texas, Willard Rollins, and Richard Hatler ("Petitioners" or "the City," "Rollins" and "Hatler") file this Reply to Respondents' Brief in Opposition to Petitioners' Petition for Writ of Certiorari. In support thereof, Petitioners respectfully show the Court as follows:

INTRODUCTION

Respondents' Brief is replete with challenges to the Petition for Writ of Certiorari asserting that the Petition is misleading in fact and law. These assertions are simply incorrect. This Court should not be misled because Respondents conspicuously have failed to support their assertions in law with citations to proper legal authority, or in fact with references to the record. The points of law which Petitioners brought before this Court remain basically unchallenged on any valid legal ground in Respondents' Brief in Opposition. Given the full disclosure of the facts in the Appendix and in the Petition, it is impossible to mislead this august Court. Finally, Respondents' blatant attempt to misrepresent the facts and the law underscores the importance of the issues presented and the necessity for this Court to grant certiorari and review the injustices dealt Petitioners in the courts below.

STATEMENT OF THE CASE

Respondents' Brief in Opposition conclusorily claims that Petitioners' statement of facts materially misrepresents the evidence, but **Respondents fail to state how the misrepresentation is made or which facts misrepresent the evidence.** Respondents' additions to the statement of facts do not bear materially on the issues before the Court

if certiorari is granted. SUP. CT. R. 15.2. Respondents' statement of the facts is not materially different from Petitioners' statement of the facts, except that portions of Respondents' facts are argument rather than fact.

REASONS FOR GRANTING THE WRIT

I. RESPONDENTS SUFFERED NO ADVERSE EMPLOYMENT ACTION AS A MATTER OF LAW.

Respondents misrepresent Petitioners' argument regarding adverse employment actions. The jury found the transfers were adverse employment actions, **but the jury made no finding that the transfers were demotions.** The lateral transfer from the day shift in the Intelligence Division to the night shift in the Patrol Division with genuine responsibilities and duties in the new position and with no reduction in salary, rank, grade, benefits, or loss of promotional opportunities, does not constitute an adverse employment action as a matter of law because it was not a discharge, demotion, refusal to hire, refusal to promote or reprimand. *See Pierce v. Texas Dep't of Criminal Justice, Institutional Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994); App. W, p. 128.

Respondents' reference to popular culture and televised police shows is irrelevant and insufficient as a matter of law to overcome the issue that the lateral transfers in this case do not constitute adverse employment actions under the First Amendment. The Fifth Circuit held that the lateral transfers were demotions because of Respondents' **perception** that the new positions were less prestigious and interesting, although the court conceded that a plaintiff's subjective perception is not enough to prove a demotion. *Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir. 1996). This holding creates a cause of action not recognized by existing Supreme Court precedent for any public employee who wants to challenge a lateral transfer to a position with no loss in pay, rank, grade, benefits or promotional opportunities and with genuine

responsibilities and duties. *See, e.g., Walsh v. Ward,* 991 F.2d 1334, 1346 (7th Cir. 1993).

The law was not clearly established in 1989 that lateral transfers such as the ones in this case constituted adverse employment actions. Petition, pp. 6-8. This Court ruled for the first time that transfers were actionable under the First Amendment in 1990, when the Court dealt with transfers which had an economic impact on the one transferred, not with subjective beliefs regarding job assignments. *See Rutan v. Republican Party of Illinois,* 497 U.S. 62, 73-74 (1990). **However, as a matter of law, no adverse economic impact on Respondents was established.** Respondents make the broad assertion that Petitioners mislead the Court by stating that a conflict does not exist regarding whether a lateral transfer such as in this case constitutes an adverse employment action under the First Amendment, but **never distinguish or analyze the cases** presented by Petitioners. Petitioners clearly articulate how the conflict exists by showing the Court the cases which hold that a lateral transfer is actionable, and those cases which hold that it is not. Respondents have made no logical, legitimate or coherent response to Petitioners' contention that this Court should resolve this clear conflict in the circuits.

II. PETITIONERS ROLLINS AND HATLER ARE ENTITLED TO QUALIFIED IMMUNITY.

Respondents misrepresent Petitioners' argument regarding qualified immunity by stating it in generalized terms. Respondents' argument that "the law was clearly established in 1989 that retaliation and adverse employment action against a public employee for protected speech was unlawful" is precisely the **global** and **generalized** statement of the law which this Court has specifically found to be insufficient as a matter of law to deny a public official his entitlement to qualified immunity. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). Rollins and Hatler testified that they knew they could not retaliate

under the First Amendment but likewise testified that they did not know that the lateral transfers in this case were impermissible under the law.

Respondents' argument is clearly erroneous that the Court should look to a "criminal equivalent to §1983" when ascertaining whether the law is clearly established. This Court has ample precedent wherein §1983 plaintiffs may not simply rely on a general statement of law to prove that the law was clearly established and to determine whether defendants' conduct met the objective legal reasonableness test. *Anderson*, 483 U.S. at 639; Petition, pp. 8-17. The courts must ask whether the official acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed years after the fact. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). An official could not reasonably have been expected to be aware of a constitutional right that had not yet been declared. *Procunier v. Navarette*, 434 U.S. 555, 565 (1978). In their Brief in Opposition, Respondents have cited no case which refutes these well established principles of law. Rollins and Hatler were also entitled to qualified immunity where a conflict among the circuits exists regarding whether a lateral transfer such as in this case is an adverse employment action under the First Amendment.

A. PETITIONERS HAVE PROPERLY BROUGHT THE ISSUE OF QUALIFIED IMMUNITY BEFORE THIS COURT.

Respondents' argument that Petitioners waived the qualified immunity defense by not raising it prior to trial is preposterous, is contradictory to this Court's rulings, and raises an issue sufficient for this Court to grant certiorari. Qualified immunity is an entitlement from suit and other burdens of litigation as well as from civil damages. *See Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Harlow v.*

Fitzgerald, 457 U.S. 800, 818 (1982). The qualified immunity defense protects the defendant from different and distinct burdens. *Kennedy v. City of Cleveland*, 797 F.2d 297, 300 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). Because qualified immunity protects the defendant from the burdens of pretrial discovery, trial and liability, this defense can be raised at various stages of litigation, including at the pleading stage in a motion to dismiss, after discovery in a motion for summary judgment, or as an affirmative defense at trial. *Kennedy*, 797 F.2d at 300. Where a defendant fails to raise the issue of qualified immunity in a summary judgment motion, the defendant has not waived the right to raise the issue later in a motion for judgment notwithstanding the verdict or in an appeal. *Cygnar v. City of Chicago*, 865 F.2d 827, 842-43 n.16 (7th Cir. 1989). Thus, while Petitioners may have waived their immunity from suit, they have not waived their entitlement to immunity from liability for civil damages. To hold that Petitioners have waived their qualified immunity would frustrate the very purposes set forth in *Siegert, Mitchell* and *Harlow*. Petitioners have raised important federal issues regarding qualified immunity which Respondents have failed to overcome in their Brief in Opposition, and this Court should grant certiorari.

B. THE JURY NEVER CONSIDERED NOR CONCLUDED THAT PETITIONERS KNOWINGLY VIOLATED THE LAW, OR ANY OTHER FACTUAL ISSUES, REGARDING QUALIFIED IMMUNITY.

Respondents' allegation that "the jury decided that Rollins and Hatler 'knowingly' violated the law" is disingenuous. The exact reason why this Court should grant certiorari is that the jury **failed to consider factual issues** regarding qualified immunity which resulted in manifest injustice to Rollins and Hatler.

C. TRIABLE ISSUES OF FACT REGARDING QUALIFIED IMMUNITY SHOULD HAVE BEEN PRESENTED TO THE JURY.

Contrary to Respondents' assertions, the jury never had the opportunity to consider triable issues of fact regarding qualified immunity, nor did the jury find that Petitioners' order to transfer Respondents to patrol was an act of retaliation. App. W. The Fifth Circuit's failure to address the district court's refusal to submit a jury instruction and issue on qualified immunity is contradictory to opinions of this Court and of other circuits because fact issues for a jury existed to determine whether Rollins and Hatler were entitled to qualified immunity. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (*quoting First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)).

III. THE *PICKERING* BALANCE DOES NOT REQUIRE A SHOWING OF ACTUAL DISRUPTION IN THE WORKPLACE, BUT ONLY A SHOWING OF A POTENTIAL DISRUPTION OF OR LIKELY INTERFERENCE WITH THE EFFICIENCY OF THE WORKPLACE BEFORE THE EMPLOYER MAY TAKE EMPLOYMENT ACTION.

Respondents' argument that the Fifth Circuit was correct in finding that the employer cannot take action prior to manifesting a disruption in the workplace on the basis that "[n]o defense witness testified that Forsyth and Kirk's publication of the wiretapping allegations undermined the DPD's operations" is contradictory to this Court's precedent. This Court has consistently held that reasonable predictions of disruption are sufficient to justify restrictions on employee speech. *See Board of County Commissioners v. Umbehr*, 518 U.S. ___, 135 L.Ed.2d 843, 852 (1996); *United States v. National Treasury Employees Union*, 513 U.S. ___, 130 L.Ed.2d 964, 985 n.21 (1995);

Waters v. Churchill, 511 U.S. 661, 128 L.Ed.2d 686, 698-99 (1994); *Connick v. Myers*, 461 U.S. 138, 152 (1983); and *Kelley v. Johnson*, 425 U.S. 238 (1976); Petition, pp. 20-22.

IV. A SPEAKER'S MOTIVATION OR INTEREST IN "SPEAKING OUT" IS A DETERMINATIVE FACTOR IN DECIDING WHETHER THE SPEECH ADDRESSES A MATTER OF PUBLIC CONCERN.

Respondents have not raised any points in opposition to Petitioners' argument that their speech was not a matter of public concern.

> Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

SUP. CT. R. 15.2. Respondents failed to preserve their First Amendment claim by not addressing this issue in their Brief in Opposition.

V. THE AWARD OF PUNITIVE DAMAGES IS IMPROPER IN THIS CASE.

Punitive damages should be awarded only where there is the requisite showing of malicious intent. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *Smith v. Wade*, 461 U.S. 30, 56 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Carey v. Piphus*, 435 U.S. 247 (1978). The jury question for punitive damages was based on the liability found under jury question numbers 2 and 3, and not whether the jury found malice or reckless or callous disregard of Respondents' rights by Petitioners. App. W. pp. 137-38, 147-48; Petition, pp. 24-26.

VI. THE FIFTH CIRCUIT IMPROPERLY FOUND LIABILITY UNDER THE TEXAS WHISTLEBLOWER ACT ("THE ACT").

This Court can review the Fifth Circuit's opinion regarding Respondents' claims under the Act, since the district court assumed supplemental jurisdiction over these claims which arose out of a common nucleus of operative facts, and the Fifth Circuit issued judgment regarding these claims. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); 28 U.S.C. §§ 1331, 1441, 1254.

As a matter of law, transfers were not actionable as adverse employment actions under the Texas Whistleblower Act in 1989. The Fifth Circuit's reliance on the news report to *The Dallas Morning News* for a finding of liability of the City of Dallas under the Texas Whistleblower Act is in direct contradiction to Texas Supreme Court law. "The media is not an appropriate 'law enforcement authority' under the Whistleblower Act." *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 145 (Tex. 1995). Since Respondents did not show the requisite causal connection between an alleged report and an alleged adverse employment action, a necessary element of their whistleblower claim is missing, and no liability was established; thus, the award of $750,000 in punitive damages against the City under the Act is without legal basis. Petition, pp. 26-29.

VII. THE FIFTH CIRCUIT'S FAILURE TO ADDRESS THE CITY'S LIABILITY UNDER 42 U.S.C. § 1983 RESULTED IN AN IMPROPER FINDING OF LIABILITY.

Respondents again materially misrepresent the district court's judgment by saying the City was not held monetarily liable under 42 U.S.C. § 1983. The district court's judgment specifically provided that Respondents could recover damages for claims brought pursuant to § 1983. App. E, pp. 20-22. The Fifth Circuit's failure to

review the City's liability under § 1983, coupled with its improper finding of liability of the City under the Texas Whistleblower Act, results in a gross miscarriage of justice. Petition, pp. 22-23.

VIII. PETITIONERS TIMELY FILED THE PETITION FOR WRIT OF CERTIORARI.

On August 16, 1996, the Fifth Circuit affirmed the district court's amended judgment, and Petitioners timely filed their Petition for Rehearing and Suggestion for Rehearing En Banc. App. A, L. The Fifth Circuit ordered on November 15, 1996, that the supplemental motion of Respondents to amend the August 16, 1996 judgment be granted to the extent necessary to remand the issue of attorneys' fees, but did not rule on Petitioners' Petition for Rehearing or Suggestion for Rehearing En Banc at that time. App. D. On March 6, 1997, the Fifth Circuit issued mandate with no prior ruling in the record on Petitioners' Petition for Rehearing. App. K. Petitioners filed a motion to recall the mandate on the basis that the Fifth Circuit had never ruled on the Petition for Rehearing, and the issuance of the mandate was untimely. The Fifth Circuit granted the motion to recall the mandate, and, on March 31, 1997, issued (1) an amended judgment affirming the district court's judgment and (2) an order denying Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc, said order also being issued as and for the mandate. App. B, C.

A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a United States court of appeals "is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." SUP. CT. R. 13.1. If, however, a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties runs from the date of the denial of the petition for rehearing. SUP. CT. R. 13.3. The Fifth Circuit's order denying the Petition for Rehearing on March 31, 1997 and

judgment on the same date necessarily establish the date from which time begins to run for the filing of the petition for writ of certiorari. Thus, the time period within which Petitioners may file a petition for writ of certiorari runs from the date of the denial of rehearing and entry of the judgment by the Fifth Circuit, March 31, 1997, through the 90th day from the entry of the judgment, June 29, 1997. Since June 29, 1997 falls on a Sunday, Petitioners had until June 30, 1997 to file their Petition for Writ of Certiorari to this Court.

CONCLUSION

For the reasons stated herein, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari, to review and reverse the opinion of the Fifth Circuit and render judgment in favor of Petitioners in all respects and on all issues, and, alternatively, to review and remand this case for a new trial for the reasons stated herein, and for such other and further relief, at law and in equity, to which Petitioners show themselves justly entitled.

Respectfully submitted,

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